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IN THE

Supreme Court of the United States

October Term, 1963

No. 703

SKOKOMISH TRIBE OF INDIANS,
Petitioner,

v.

E. L. FRANCE, ET AL.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MALCOLM STEWART MCLEOD
Counsel for Petitioner.
1519 Norton Building
Seattle, Washington 98104

FREDERICK PAUL and KIETH CALLOW of
LITTLE, PALMER, SCOTT & SLEMMONS
of Counsel

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SKOKOMISH TRIBE OF INDIANS,
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E. L. FRANCE, ET AL.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Skokomish Tribe of Indians, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on July 27, 1963.

CITATIONS TO OPINIONS BELOW

The opinion of the District Court is reported *sub nom* in *Skokomish Tribe of Indians v. E. L. France, Trustee*, 226 Fed. Supp. 840 (1958). The opinion of the Court of Appeals, printed as Appendix A hereto, *infra*, p. 31, is reported in 320 F.(2d) .....

JURISDICTION

The judgment of the Court of Appeals was entered on July 27, 1963 and is printed in Appendix A. On October 24, 1963, the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit, extended the time

within which to apply for a writ of certiorari from October 29, 1963 to December 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

The jurisdiction of the District Court under 28 U.S.C. 1331 and 1345 was sustained by the Court of Appeals on the first appeal in an opinion filed June 26, 1959 from cause No. 16008. The Court of Appeals had jurisdiction of this appeal under 28 U.S.C. Sec. 1291 and 1294.

QUESTIONS PRESENTED

1. Where the Skokomish Tribe of Indians reserved for themselves a reservation at the head of Hood's Canal under the Treaty of Point No Point of January 26, 1855 (printed as Appendix B) and the said reservation was further implemented by an executive order dated February 25, 1874. Did this reservation by these "fish-eating" Indians out of their aboriginal habitat evidence an intention to constitute a reservation tot hem of the appurtenant and adjacent tidelands abutting on the boundaries of the reservation so described in the treaty and in the executive order? (Where they obtained 29 species of fish from these tidelands—Appendix E.)

2. That the construction of the treaty and the Executive Order in the instant case conflict with the prior opinions of the Supreme Court of the United States and the Ninth Circuit Court of Appeals in the following cases, to-wit: (See table cases overruled by this opinion, Appendix D.)

James v. Nicholson, 9 Howe 356, or 50 U.S. 356, at page 364; 13 Law Ed. 172; also

United States v. Wynans, 198 U.S. 371, 25 Sup. Ct. 662, 49 Law Ed. 1089, also *Santa Fe Pacific R. R. Co.*, 214 U.S. 339, 86 Law Ed. 250, also *United States v. Moore*, 62 Fed. Sup. 660, and *Moore v. United States*, 157 F.(2d) 716.

STATUTES INVOLVED

The Treaty of Point No Point between the United States of America and the Skokomish Tribe of Indians was entered into on January 26, 1855 and is found in 10 Stat. page 12 Stats. 933 and the executive order of February 24, 1874, Appendix C, signed by President U. S. Grant, and Washington Enabling Act, 25 Stats. Chapt. 180, 676.

STATEMENT OF THE CASE

The Skokomish tribe of Indians reserved for themselves a reservation at the head of Hood's Canal, a tidal basin connected with Puget Sound in Western Washington, which reservation was a portion of over a million acres ceded to the United States under the Treaty of Point No Point. The salt water fishery is the great resource of the Northwest Coast Indians and is comparable to the buffalo on the great plains for the Indians of the midwest. Nineteen years after the treaty was entered into, President U. S. Grant issued an executive order creating the reservation set out in the treaty for the Skokomish tribe. In 1889, the State of Washington entered the Union, and when the shellfish beds on Hood's Canal became important between 1900 and 1950, the State of Washington and its vendees appropriated the tidelands abutting on and adjacent to the Skokomish reservation at the head of Hood's Canal in

Western Washington. Although the United States entered into the treaty with the Skokomish, it has failed and refused to preserve the tidelands for the tribe. The Skokomish tribe brought a suit against all persons in title to these tidelands, including the respondents in the within case and the District Court ruled against the tribe, quieting title in the respondents and the Court of Appeals affirmed this decision as set out in Appendix "A" herein. There are thirty-three tribes of Indians in Western Washington covered by treaties with the United States and a majority of them have similar provisions reserving fishing rights and shellfish beds to the Indians and these treaties have uniformly and without exception been construed to include as a portion of the fishing right all tidal waters on shore lands abutting on reservations. The Court of Appeals has, by its decision, created a real and serious conflict with a long line of cases of this court and other decisions within this circuit concerning the ownership of shore lands and tidelands abutting reservations.

REASONS FOR GRANTING THE WRIT

Reason No. 1

The decision of the Court of Appeals in the instant case is in conflict with prior decisions of this court.

The first issue before the court below concerns the intention of the Indians and the United States when they held the treaty conference in 1855 between three thousand Indians and Governor Stevens representing the United States. The table set out in Appendix "D" graphically illustrates the precedent established by judicial decision

and practice over the past one hundred years concerning the intention of the Indians of the United States with reference to the inclusion of tidelands within the boundaries of Indian reservations in the Puget Sound area where 90 per cent of the subsistence of the Indians came from the salt water. A cursory examination of all of the treaties of the thirty-three tribes in this area will clearly indicate that the salt water and its shore lands and tidelands were the major source of the aboriginal livelihood. This decision, if allowed to stand, will cloud the titles and leave unresolved the question of ownership of tidelands by all of the tribes having any shore lands abutting on the reservations. This case will place this valuable aspect of aboriginal rights and subsistence in dispute and it must so remain until settled by the Supreme Court. Clearly, the question presented is extremely important to the Indian tribes of the Northwest coast and Alaska and settlement of this question is in the public interest and of great importance to the few remaining original Americans. This question, in its unsettled condition, will arise in all of the treaties in the State of Washington and will afford opportunities to question the title of the various tribes to tidelands which they have never relinquished since time immemorial.

Reason No. 2

The decision of the court below is clearly erroneous and is in conflict with the prior decisions of the Ninth Circuit Court of Appeals, as graphically illustrated in Appendix "D" and the attempt to distinguish the prior decision of the Ninth Circuit is patently abortive.

Reason No. 3

The decision of the court below is erroneous with reference to the rules of construction applied to the Treaty of Point No Point and the Executive Order of U. S. Grant in 1874. The rules of construction embraced by the Court of Appeals conflicts with the applicable decision of this court. There have been numerous cases as hereinafter set out which began with the birth of the Union and John Marshall. The instant case impliedly and inferentially overrules and changes these rules of construction. The court below has judicially legislated that, if a necessary and imperative adjunct to the aboriginal subsistence is not precisely described by metes and bounds, it is not a part of the reserve and all doubt must be resolved in favor of the State and against the Indian.

Reason No. 4

The Circuit Court opinion is in conflict with the four corners of Point No Point.

Another reason that certiorari should be granted is that the Circuit Court has erroneously applied the rules of treaty construction and has completely ignored prior cases determined by the United States Supreme Court concerning the rules of treaty construction and has completely ignored various provisions of the treaty, that is, to-wit: Article II, Article IV and the first sentence in Article IX. The trial court's opinion is totally erroneous because it is based on one phrase of the treaty, "along Hood's Canal," while other portions of the treaty as a whole express the Indian's intent. (See Appendix "B")

1. That a clause of Article II of the Treaty provides:

". . . and so far as necessary surveyed and marked out for their exclusive use . . .

and this clause denotes a reserve where the Indians could pursue their aboriginal use of tidelands as well as other sources of food for their sustenance which was 90 per cent fish with 29 species as set out in Appendix "E." What is the difference between this clause and the phrase, *"a tract of land sufficient for their wants"*? Looking at the four corners of the treaty, the instant case should follow *U. S. v. Moore*, 157 F.(2d) 760. The two treaties and executive order apply to tribes about thirty air miles apart in these two cases, and should be construed alike.

2. Article IV of the Treaty of Point No Point provides:

". . . *the right of taking fish at all usual and accustomed grounds and stations is further secured to said Indians* . . ."

and it further provides:

. . . *"that they shall not take shellfish from any bed staked or cultivated by citizens."* (Emphasis supplied)

This article to the treaty would be meaningless unless the Skokomish had reserved their tidelands as the gateway to the tidal basin of Hood's Canal and salt water containing 29 species of fish and shellfish as well as a water highway for their canoes. They utilized Hood's Canal for fish and shellfish as described by Myron Eells, who observed their fishing economy and described it in the 1850s and '60s in Appendix "E" herein.

The Twana or Skokomish Indians and the treaty negotiators were so concerned about the shellfish that they made a special clause or provision in the treaty for the

preservation of that right, which could only be exercised or have meaning if the Skokomish or Twana retained their tidelands. These tidelands extend from and are adjacent to and appurtenant to the reservation and cover approximately two miles of bottom or basin of Hood's Canal at the mouth of the Skokomish River and are an integral part of the reservation which they never intended to give up under the treaty set out in Appendix "B."

The Indians were a sovereign nation, but an ignorant, dependent and helpless people, as is indicated by the first sentence in Article IX of the Treaty of Point No Point, found in Appendix "B" herein as follows:

> "The said tribes and bands acknowledge their dependence on the United States, and promised to be friendly with all citizens thereof . . ."

That this treaty was entered into by Governor Stevens for the United States and 3,000 Indians who were unable to speak the language and had no knowledge of any of the contents of the treaty other than they had promised that they would have reserved unto themselves all of their means of eking out their aboriginal subsistence from the land. It is apparent that the Skokomish, like some 33 other tribes on the Puget Sound tidal basin, lived on a tidal basin known as Hood's Canal. They intended that they should continue to live in their aboriginal economy by fishing, which comprised 90 per cent of their diet.

ARGUMENT

This case involves the construction of the Treaty of 1855 entered into between the Skokomish Indian Tribe and creating the Skokomish Indian Reservation (12 U.S.

Stat. at large 933; ratified and proclaimed 1859). The treaty set aside as the exclusive habitat of the Skokomish Indians lands at the head of Hood's Canal which was thereafter to be set apart by an executive order and, as the treaty states (see Appendix B):

> ". . . and so far as necessary surveyed and marked out for their exclusive use; * * *"

At the outset we would like to point out that the Circuit Court of Appeals, while underscoring this language, overlooked its purport in that it indicates that so much of the land as was necessary for the livelihood of this tribe was to be exclusively theirs. Thereafter an executive order signed by President Grant set forth the boundaries of the Skokomish Indian Reservation and the last phrase of the executive order is the matter here in issue. It states, after with some particularity following section lines from a point on Hood's Canal.

> "Thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning."

It is possible to draw the line from the place where the north boundary of the reservation meets Hood's Canal southerly to the place of beginning in a variety of ways. The real question is whether this line should be drawn in such a way as to include the tidelands which abut that which is conceded to be in the reservation, or whether they should be excluded.

It is best to commence a consideration of this problem by endeavoring to place oneself in the position of the contracting parties over one hundred years ago. This

understanding is reflected by the Enabling Act which enabled the Territories of North and South Dakota, Montana and Washington to becomes states. This Enabling Act is found in 25 U.S. Stat. at large, Ch. 180, p 676, and was approved February 22, 1889. It reads in part as follows:

> "Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States . . ."

This Enabling Act is reflected in almost verbatim language in the Washington State Constitution, Article XXVI, which was ratified by the people of the state on October 1, 1889. The Enabling Act was discussed in *Vermillion v. Spotted Elk*, 85 N.W. (2d) 432 (N.D.) (1957).

We submit that the Court of Appeals' decision is contrary to *Northern Pacific Railway Co. v. United States*, 227 U.S. 355, 33 S.Ct. 368, 57 L.Ed. 544 (1913). The Circuit Court concedes that the *Northern Pacific Railway* case involved conflicting testimony in that several surveys were made. It is pointed out in this case:

> "They reserved, it is true, a much lesser tract, but it was natural and inevitable that the greater boundaries of nature should be selected to define both. These the Indians could understand and estimate."

It is, to us, an untenable construction to place upon

this treaty to say that the means of ingress and egress from the land to the water is cut off by an invisible line imposed by the treaty. The *Northern Pacific* case, *supra*, states in part (the Skokomish canoe used Hood's Canal as a highway):

> "We realize that there is confusion in the calls, irreconcilability, it may be, from some points of view; but our effort must be to ascertain and execute the intention of the treaty makers; and as an element in the effort we have declared that concession must be made to the understanding of the Indians in redress of the differences in the power and intelligence of the contracting parties. *United States v. Winans*, 198 U.S. 371, 49 L.Ed. 1089, 25 Sup. Ct. Rep. 662. The present case invokes in special degree the principle."

and concluding, the court stated in part:

> "The court of appeals expressed the view that the rule that resolves doubts in favor of the patent issued by the United States does not apply in such cases citing *Leavenworth, L. & G. R. Co. v. United States*, 92 U.S. 733, 23 L.Ed. 634; *Stewart v. United States*, 206 U.S. 185, 51 L.Ed. 1017, 27 Sup. Ct. Rep. 631; *Minnesota v. Hitchcock*, 185 U.S. 373, 46 L.Ed. 954, 22 Sup. Ct. Rep. 650. Much can be said in support of that view. It must be borne in mind that the Indians had the primary right. The rights the government has are derived through the cession from the Indians. If the government may control the cession and control the survey, and by the action of the agents foreclose inquiry or determine it, an easy means of rapacity is afforded, much quieter, but as effectual, as fraud. We should hesitate to put the goverment in that attitude. It rejects that attitude and accepts a greater responsibility. It yields to the rule which this court has declared—that it 'will construe a treaty with the Indians as "that unlettered people" understood it, and "as justice and reason

> demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and counterpoise and inequality "by the superior justice which looks only to the substance of the right, without regard to technical rules." *Choctaw Nation v. United States*, 119 U.S. 1, 30 L.Ed. 306, 7 Sup. Ct. Rep. 75; *Jones v. Meehan*, 175 U.S. 1, 44 L.Ed. 49, Sup. Ct. Rep. 1. *United States v. Winans*, *supra*."

The result of this case is, we respectfully submit, to overrule, without specifically saying so, a long line of cases including *Worcester v. Georgia*, 6 Pet. 515; *The Kansas Indians*, 5 Wall. 737; *Choctaw Nation v. United States*, 119 U.S. 1; *Jones v. Meehan*, 175 U.S. 1, 20 S. Ct. 1; *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 93 L.Ed. 1231.

Likewise, there has been a long line of cases which have dealt with this problem of construing Indian treaties in such a way that their purpose of providing the Indians forced upon a reservation with a place where they could be self-sustaining. *United States v. Stotts*, 49 F.(2d) 619 (1930); *Corrigan v. Brown*, 169 Fed. 477 (1907).

In *Moore v. United States*, 157 F.(2d) 760 (1946), the same Circuit Court stated in part:

> "The Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential. Without this the colony could not prosper in that location. The Indians naturally looked on the fishing grounds as part of the islands and proceeded on that theory in soliciting the reservation. They had done much for themselves and were striving to do more. Evidently Congress intended to conform its action to their situation and needs * * *."

We believe that the same implications have been carried forth in the following cases before the United States Supreme Court: *Squire v. Capoeman*, 351 U.S. 1, 76 S. Ct. 611, 100 L.Ed. 883 (1956); *United States v. Payne*, 264 U.S. 447, 68 L.Ed. 782 (1924).

The trial court's position is that the Skokomish River itself was where the tribe gained its food and not on the tidelands, and that, therefore, the tidelands could not have been intended as part of the reservation. This seems to be absurd to us on its face; first, because the river itself must flow across the tidelands to reach tide water, and, secondly, because such an interpretation is a relegating of this Indian tribe to specific items of diet rather than making available to it all that was part of their sustenance at the time of the execution of the treaty (29 species of food fish—Appendix E). The interpretation that the trial court and the Circuit Court places upon the treaty is a refinement and a narrowing which can only be the product of the contemporary mind and not a candid acknowledgment of the Indian understanding of 1885. In *United States v. Winans*, 198 U.S. 371, 25 S. Ct. 662 (1905), it was stated:

> "The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of right from them—a

reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. ° ° ° It is further contended that the rights conferred upon the Indians are subordinate to the powers acquired by the state upon its admission into the Union. In other words, it is contended that the state acquired by its admission into the Union upon an equal footing with the original states, the power to grant rights in or to dispose of the shore lands upon navigable streams, and such power is subject only to the paramount authority of Congress with regard to public navigation and commerce. The United States, therefore it is contended, could neither grant nor retain rights in the shore or to the lands under water.

"The elements of this contention and the answer to it are expressed in *Shively v. Bowlby*, 152 U.S. 1, 38 L.Ed. 331, 14 Sup. Ct. Rep. 548. It is unnecessary, and it would be difficult, to add anything to the reasoning of that case. The power and rights of the states in and over shore lands were carefully defined, but the power of the United States, while it held the country as a territory, to create rights which would be binding on the states, was also announced, opposing the *dicta* scattered through the cases which seemed to assert a contrary view. ° ° °"

We request the Supreme Court to grant the writ of certiorari. The decision of the District Court and the Circuit Court of Appeals is a long step in judicial undermining of the treaty rights of Indian tribes. If the reservation system is to be eliminated, it should be eliminated

by action in the same level as it was begun and compensation should be made for that which is taken away. The step which has been taken by this decision is a breach of a faith that heretofore has been kept for over a century.

Respectfully submitted,

MALCOLM STEWART MCLEOD
Counsel for Petitioner
1519 Norton Building
Seattle, Washington 98104

FREDERICK PAUL and KIETH CALLOW of
LITTLE, PALMER, SCOTT & SLEMMONS
of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SKOKOMISH INDIAN TRIBE,	*Appellant*,	No. 17,933
v.		July 27, 1963
E. L. FRANCE, TRUSTEE, et al.,	*Appellees*.	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

Before JERTBERG and BROWNING, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Appellant, an Indian tribe incorporated under an Act of Congress,[1] brought this action to establish a claim of title to a strip of tidelands adjoining its reservation on the Hood's Canal and the Skokomish River in Western Washington. Appellant's claim is based upon a treaty between the United States and certain Indian tribes dated January 26, 1855, proclaimed April 29, 1859 (12 Stat. 933), and an executive order dated February 25, 1874. Appellees claim title through various conveyances from the State of Washington. The case was tried before the court without a jury. Pursuant to findings of fact and conclusions of law in favor of appellees, a judgment and

[1]Act of June 18, 1934 (48 Stat. 984) as amended by Act of June 15, 1935 (49 Stat. 378).

decree was entered dismissing plaintiff's complaint with prejudice and quieting title in the respective appellees.

The district court had jurisdiction by virtue of 28 U.S.C. § 1331, as held in *Skokomish Indian Tribe v. France*, 269 F.(2d) 555 (1959). This court has jurisdiction under 28 U.S.C. §§ 1291 and 1294.

The primary issue is whether the tidelands were included within the lands set apart for the use of the Indian tribe under the executive order made pursuant to the treaty. It is conceded that neither the treaty nor the executive order expressly described the tidelands at issue. Article II of the treaty reads in pertinent part:

> "There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz: The amount of six sections, or three thousand eight hundred and forty acres situated at the head of Hood's Canal, *to be hereafter set apart and, so far as necessary, surveyed and marked out for their exclusive use;* ° ° °" (Emphasis added.)

The executive order of February 25, 1874, reads:

> "It is hereby ordered that there be withdrawn from sale or other disposition and set apart for the use of the S'Klallam Indians the following tract of country on Hood's Canal in Washington Territory, inclusive of the six sections situated at the head of Hood's Canal, reserved by treaty with said Indians January 26, 1855 (Stats. at Large, Vol. 12, p. 934), described and bounded as follows: *Beginning at the mouth of the Skokomish River;* thence up said river to a point intersected by the section line between Sections 15 and 16 of Township 21 North, in Range 4 West; thence north on said line to a corner common to Sections 27, 28, 33 and 34 of Township 22 North, Range 4 West; thence due east to the southwest corner of the southeast quarter of the southeast quarter

> of Section 27, the same being the southwest corner of A. D. Fisher's claim; thence with said claim north to the northwest corner of the northeast quarter of the southeast quarter of said Section 27; thence east to the section line between Sections 26 and 27; thence north on said line to corner common to Sections 22, 23, 26 and 27; *thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning.*" (Emphasis added.)

Official surveys of the reservation boundaries were made in 1862 and again in 1873, and the balance of the public lands in the vicinity of Hood's Canal in 1873.

There is no evidence that, prior to the commencement of this action in 1948, appellant and its members had asserted title to the tidelands in controversy. The State of Washington began selling the tidelands about 1901. Appellees and their predecessors in title have occupied the lands continuously since their acquisition, have paid taxes thereon, and have made extensive improvements upon portions of the land.

It is the general rule at common law that, where the shore or shore line of a body of navigable water is designated as a boundary, the high water mark is the limit of the boundary line. This rule was established in the early case of *United States v. Pacheco*, 2 Wall. 865, 866, 69 U.S. 587, 590, 17 L.Ed. 865 (1865), where the court said:

> "The position, that by the bay as a boundary, is meant, in this case, the line of low water mark, is equally unfounded. By the common law, the shore of the sea and, of course, the arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea or a bay is named as a boundary,

> the line of ordinary high water mark is always intended where the common law prevails."

Appellant contends, however, that the ordinary rule should not be applied in this case; that the treaty and executive order defining the reservation are ambiguous; that the ambiguity must be resolved by construing the language of the instruments as they would naturally be understood by the Indians at the time; that the tidelands were essential to the Indians' livelihood and accordingly the Indians must have understood that they were to have the tidelands; that the surveys which excluded the tidelands from the reservation were ineffectual and must be ignored.

The rule applicable to the construction of treaties with Indian tribes was well summarized in *Choctaw Nation v. United States*, 318 U.S. 423, 431-2, 63 S.Ct. 672, 87 L.Ed. 877 (1943), where the court said:

> "Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. (Citing cases.) Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' (Citing cases.) *But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.*" (Citing cases.)" (Emphasis added.)

See also *Ute Indians v. United States*, 330 U.S. 169, 67

S.Ct. 650, 91 L.Ed. 823 (1947), and *Shoshone Indians v. United States*, 234 U.S. 335, 65 S.Ct. 690, 89 L.Ed. 985 (1945), where the court said at 324 U.S. p. 353:

> "Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian to the Indians, to our ward's prejudice. 'All doubts' say petititoners, 'must be resolved in their (the Indians') favor.' Mr. Justice McLean, concurring in *Worcester v. Georgia*, 6 Pet. 515 at 582, said, 'The language used in treaties with the Indians should never be construed to their prejudice.' But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty. That, we think, is the rule which the court has applied constantly to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

The pertinent findings of the trial court with respect to the treaty, executive order, surveys, the nature of the tidelands, and the use of the tidelands by the Indian tribe are as follows:

> "2. The treaty (Ex. 3) does not describe the tidelands in issue.
>
> "3. The executive order defines the boundary of the reservation along Hood's Canal as 'thence southerly and easterly along said Hood's Canal to the place of beginning.' The executive order does not describe the tidelands in issue in this case, nor purport to include the same in the description of the reservation. (Ex. 4.)
>
> "4. The exterior boundaries of the Skokomish Reservation referred to in the executive order were surveyed and the easterly and northerly boundary along Hood's Canal was defined and surveyed as the mean-

der line along such waters as established by such official government surveys. (Defendants' Exhibit A-14-1, Document B; Defendants' Exhibit A-9; Plaintiff's Exhibit 5-f).

"5. The original reservation selected by actual occupancy and use by the government officials in charge of the Indians on Hood's Canal did not reach as far north as the common boundary to Sections 35 and 26 in Township 22 North, Range 4 West, but was bounded on the north margin by the south boundary of the A. D. Fisher Donation Claim (Exhibit 7; A-10; Plaintiff's Exhibit 12; Defendants' Exhibit A-14-1). The recommendations of the government officials to the President were to enlarge the then reservation by adding thereto the A. D. Fisher Donation Claim. The Fisher Donation Claim included all the Hood's Canal frontage in said Section 26 and a portion of Section 35 north of the area up to then selected for and used as a reservation. The executive order legal description included the area in the A. D. Fisher Donation Claim.

"6. Other executive orders of the same period, both before and after the executive order here in issue, used varied wording to describe boundaries along navigable waters, and in the case of other executive orders, the boundaries are sometimes defined as extending to 'low water mark.' (Defendants' Exhibit A-1).

"7. The treaty (Exhibit 3) reserves for use and occupancy of the Indians six sections or 3,840 acres 'situated at the head of Hood's Canal, to be *hereafter* set apart, and so far as necessary *surveyed* and *marked* out . . .' There is no evidence of why or when the mouth of the Skokomish River at the bulge of Hood's Canal at Annas Bay was selected rather than the mouth of the Union River at the head of Hood's Canal at the location of the present Town of Belfair. Some early mission settlements for Indian affairs were at the Union River location on the Canal.

"Nothing is reflected in the minutes of the proceed-

ings concerning the treaty or in the history of the event or in any of the evidence to show what location was thereafter to be set aside for Indian use as a reservation other than 3,840 acres 'at the head of Hood's Canal.' No evidence shows any understanding or intention or consideration of whether actual tidelands at the site in litigation or at any other site were to be included in the 3,840 acres. The actual reservation was 4,173.31 acres (Exhibit A-14-1). Such acreage was computed shoreward of the meander line.

"8. Title to submerged land under navigable waters vested in the State of Washington upon its admission into the Union and was held by the United States previously thereto in trust of the State to be formed (except only for such disclaimers as appear in the State Constitution adopted conformable to the Enabling Act of the Congress).

"9. The reservation abutting on Hood's Canal was surveyed and divided into Indian lots and pursuant to due proceedings in that behalf the same were allotted to various individual Indians who in turn by due proceedings approved by the necessary government authorities sold such Indian lots and conveyed title thereto to defendants' predecessors in title. (Admitted Fact VI; Pretrial Order, page 19, et seq.)

"10. The entire frontage of the Skokomish Reservation along Hood's Canal was thus disposed of by allottees and no portion of such frontage remains in the reservation. (Hanson Map, Exhibit A-59; Admitted Fact VI; Exhibits A-21, A-63, A-64, A-25 to A-35 and A-2.)

* * *

"14. At the time of the treaty and at the time of the executive order, the Indians for whose benefit the same were made were dependent for their livelihood in part upon fish. The major and primary fish so used was salmon. The only foods referred to as of concern to the Indians in the minutes of the treaty negotiations were 'berries, deer and salmon.'

"15. The salmon were easily procured in the rivers and creeks, particularly in the Skokomish River, and were ordinarily caught there with traps. The Indians had their basic villages up the rivers in sheltered wooded areas, close to the rivers and creeks where salmon abounded and other game was readily procurable. Migration by the Indians was primarily governed by salmon runs in various seasons of the year according to species running in other parts of Hood's Canal and in other rivers and creeks tributary thereto.

"16. The Skokomish villages were primarily at the juncture of the north fork of the Skokomish River and the south fork of the Skokomish River and on Vance Creek west of that fork, which is up the Skokomish River westerly of the reservation and many miles from the tidelands in issue. (Exhibit A-62, pages 6-143 and 6-144; Elmendorf Exhibit 60, pages 32 to 37, Geographic Sites 1 to 32 and map opposite page 48.)

"17. No salmon creek or river entered Hood Canal across the tidelands in issue except the Skokomish River. (Exhibit 60, pages 38-39; Exhibit 36; Exhibit 5; Exhibit 41.)

"18. Shell fish were used by the Indians at the time of the treaty and executive order but to a limited extent, and more as a delicacy, and the livelihood of the Indians was not dependent in material degree upon shellfish or any type of fishing on or from the tidelands in issue.

"19. The usual locations at which shellfish were procured were miles from the reservation and were reached by canoe travel on Hood's Canal. * * *

"20. The tidelands in issue, particularly in Section 26, are not and were not a source of native shellfish in usable quantities.

"21. The tideland strip in Section 26 is narrow, rocky and gravelly. Exploration for shellfish within such strip is onerous and unrewarding.

"22. The salinity of the waters of Annas Bay on

Hood's Canal on which the reservation abuts is below that permitting shellfish to thrive and below that at which some species can survive. The entire Annas Bay salinity is affected by the discharge of the Skokomish River into the bay, which is the largest fresh water inlet into Hood's Canal, and with each turn of the tide the fresh waters of the river wash the tidelands in issue. (Dr. Stein Testimony, Exhibit A-49 to A-58; Testimony of Alice Hanson and Wallace Hanson.)

"34. The land and legal descriptions of land contained and mentioned in the treaty and the executive order and in the surveyor's notes and surveys and in bureau and departmental correspondence and records did not contain, mention or include tidelands or tidal waters, and nothing therein grants, gives or conveys or reflects an intention to grant, give or convey to plaintiff or to any predecessor of plaintiff any right, title or interest in or to any land not therein described, nor to any tidelands or submerged lands or properties claimed herein by defendants."

These findings fully sustain the district court's conclusion that "the tidelands involved in this action are not a part of the Skokomish Indian Reservation" and that the "State of Washington acquired title to the tidelands * * * upon the admission of that state into he Union." Unless clearly erroneous the findings must be accepted by this court. Rule 52, F.R.C.P. "It is not the function of this court to retry cases on appeal." *Glens Falls Indemnity Company v. United States*, 9 Cir. 1955, 229 F.(2d) 370, 373. After reviewing the record in its entirety, it is our conclusion that the findings are not clearly erroneous, but, on the contrary, are amply supported by the evidence.

The use of the tidelands by the Indian tribe, as disclosed

by the evidence, does not support appellant's contention that the tidelands were essential to the Indians' livelihood and that the Indians accordingly must have understood they were to have the tidelands. The minutes of the treaty negotiations[2] contain no reference to tideland ownership, nor to the use of shellfish as food. Initially many members of the tribe objected to the proposed treaty. They were concerned with possible loss of their sources of food—"berries, deer and salmon." The first to speak said in part:

> "I wish to speak my mind as to selling the land, Great Chief! What shall we eat if we do so? Our only food is berries, deer and salmon—where then shall we find these? I don't want to sign away all my land, take half of it, and let us keep the rest. I am afraid that I shall become destitute and perish for want of food." (Ex. 10.)

After the Indians had been assured that the reservation would only be a place at which they must make their homes, the Indians discussed the proposal among themselves and on the following day assented to the treaty. At that time one of the tribe said:

> "My heart is good. I am happy since I have heard the paper read and since I have understood Gov. Stevens, particularly since I have been told that I could look for food where I pleased and not in one place only. * * * We are willing to go up the Canal since we know we can fish elsewhere. We shall only

[2]In the treaty negotiations conducted at Point No Point, Governor Isaac Stevens represented the United States. At a meeting on January 25, 1855, the treaty was read and interpreted to the Indians, followed by statements of various Indians and explanations of the terms of the treaty by Governor Stevens and his assistants. The treaty was signed on January 26.

leave there to get salmon, and when done fishing will return to our houses." (Ex. A-8.)

It is clear that the reservation was intended only as a residence and the Indians were to remain free to roam and fish at their usual places.[3] From the testimony of the Indian witnesses and the many historical documents and works in evidence, it is apparent that the Skokomish Indians roamed extensively over the Hood's Canal, following seasonal fishing. Their primary sources of food were the different species of salmon which abounded in the streams entering the canal. They were both an inland and salt water people. One group, the Vance Creek settlement, lived almost entirely an inland-riverine existence, while the lives of the others centered upon river settlements in winter and upon Hood's Canal in the summer.

It is true that shellfish and other forms of sea life were gathered by the Skokomish along the canal. While there is some conflict in the testimony of the Indian witnesses, the evidence clearly preponderates in favor of the trial court's findings "That the usual locations at which shellfish were procured were miles from the reservation and were reached by canoe travel on Hood's Canal"; and "That the tidelands in issue, particularly in Section 26, are not and were not a source of native shellfish in usable quanities."

Appellant relies heavily upon Exhibit 60, excerpted from research studies of Dr. W. W. Elmendorf, a well-qualified expert in the field of ethnology or cultural anthropology.

[3]The right to fish was granted by Article IV of the treaty, viz., "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting and gathering roots and berries on open and unclaimd lands."

who did considerable discriminating research among the Skokomish Indians. But Dr. Elmendorf's studies, when closely examined, support the findings of the trial judge. According to Dr. Elmendorf, the Skokomish were part of a group of Indians living along the shores of Hood's Canal, which he termed 'Twana' Indians. He says in pertinent part:

> "The most important source of food for all Twana was Pacific salmon, four species of which were common in the canal and ran in its tributary streams. * * * The bulk of the salmon catch was made in rivers, with weirs, dip nets and harpoons, during late summer and fall runs. Salt water trolling and netting was of minor importance, in particular to the Skokomish with their large river runs of salmon.
>
> * * *
>
> "River fishing for all these fish (king, silver, humpback, dog and steelhead) was primary, with weirs and associated dip-net structures the most productive method. Salmon, as well as other types of fish, were also trolled for with hook and line from canoes in salt water, but this method furnished a relatively small proportion of the catch." Ex. 60, pp. 57 and 60.
>
> * * *
>
> "Women gathered molluscs during the warmer months of the year, using for clam digging the same digging stick employed for roots and open work baskets carried by a tumpline. Some species, particularly clams, were obtained in large quantities and furnished an important part of the Twana diet.
>
> * * *
>
> "Clam digging started in May in the region at the head of Hood's Canal (duxwle' lap)[4] and continued

[4]The reference is to the geographic site located and described in an earlier portion of the work (Ex. 60). Dr. Elmendorf set forth at pp. 32-55 of the exhibit a list of geographic sites identified by their Indian names which were important in the life of these Indians before they were placed on the reservation. He indicated the location of these sites by number on a map, which appears opposite page 48 of the exhibit. Duxwle 'lap is site No. 128 and is identified as "'place at the farthest-in tail end (of the water)' * * * An extended-area term for all the territory at the head of Hood's Canal; in specific reference, the actual end of the inlet, the mouth of the Union River." (See Ex. A-62.)

> through the summer. As the season grew later the best clam beds were found farther down the canal, the latest intensive clam digging was in August on beaches in the area termed slca'wks,[5] on the east shore of the lower (northern) canal. Here work parties from various Twana village communities foregathered in the late summer." Ex. 60, p. 123.

Both of these sites are several miles from the reservation.

We agree with the following summary of the trial judge in his unpublished memorandum opinion:

> "Allowing in full measure for the inequalities of understanding and position of the parties negotiating the treaty and giving full effect to the rules of treaty construction favoring the primitive Indians, on the entire record in the present case, this court is fully satisfied that not any one of the parties negotiating the treaty of 1855 had the slightest thought or intention that the treaty or the executive order to follow would vest ownership to the tidelands in question in the Skokomish or in any other Indian tribe. On the contrary, the record of negotiations, the language and substance of the treaty, the specific terms of the executive order, and all pertinent circumstances shown by the evidence negative understanding or intent to such effect by any of the parties negotiating the treaty or concerned with or by the order. Considering the absence of support for any such contention, the long delay in any mention or assertion thereof is not surprising."

The cases upon which appellant relies are distinguishable. In *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S. Ct. 40, 63 L.Ed. 138 (1918), Congress had set

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[5]Slca'wks refers to site No. 176, "The east shore of Hood's Canal from Bangor (King Spit) north of Port Gamble." (See Ex. A-62.)

apart "a body of lands known as the Annette Islands." It was held that the reservation included the adjacent fishing waters and submerged land, the court finding that the adjacent fishing grounds were essential to the subsistence and economic development of the tribe and accordingly Congress must have intended to include them. In *United States v. Moore*, W. D. Wash. 1945, 62 F. Supp. 660, aff'd 157 F. (2d) 760, the United States, by treaty, agreed with the Indians to reserve "a tract or tracts of land sufficient for their wants." The executive order setting apart the tract was silent as to any rights in the bordering waters. The court held that the treaty and executive order should be construed to include the lands under the adjoining waters, because the record established that they were fish-eating Indians dependent for their sole means of support upon the continued use of those waters, from which they caught their fish.

The distinction between those cases and the instant case is one of fact and readily apparent. Here the trier of facts has found, upon substantial evidence, that the tidelands were not essential to the livelihood of the Indians at the time of the treaty and the executive order providing for the reservation. It is clear from the record that the reservation was not intended to support these Indians, as was the case in *Alaska Pacific Fisheries v. United States*, or to be "sufficient for their wants," as was the expressed intention of the treaty in *United States v. Moore*.

Nor is this a case such as *Northern Pacific Railway Company v. United States*, 227 U.S. 355, 33 S. Ct. 368, 57

L.Ed. 544 (1913),[6] or *United States v. Romaine*, 255 Fed. 253, 9 Cir. (1919),[7] where surveys were found to be inconsistent with the understanding of the parties to the treaties and where the applicable documents contained language supporting the boundary claims of the Indians. The documents and historical background material in this case do not manifest an intention of the treaty makers to include the tidelands in the Skokomish Reservation. Accordingly, title to the tidelands vested in the State of Washington upon its admission to the Union and passed subsequently to the appellees. See *United States v. Holt State Bank*, 270 U.S. 49, 46 S. Ct. 197, 70 L.Ed. 465 (1926).

As the trial judge pointed out in his memorandum opinion, a claim is pending with the Indian Claims Commission whereby the Skokomish Tribe seeks an award for alleged inadequate compensation for the lands ceded under the 1855 treaty. If, in fact, the treaty and executive order did not make adequate provision for the tribe, com-

[6] In *Northern Pacific Railway Company v. United States*, the Supreme Court affirmed a construction of a treaty between the United States and the Yakima Indians, establishing the western boundary of the Yakima Reservation at the *main* ridge of the Cascade Mountains, rather than at a lesser ridge which would reduce the size of the reservation. While the treaty was susceptible to other construction, it contained the following language in the boundary description, "thence along the southern tributary to the Cascade Mountains; thence southerly along the *main* ridge of said mountains, passing south and east of Mount Adams, to the spur whence flows the waters of the Klickitat and Pisco rivers, * * *" 227 U.S. at 357. (Emphasis added.)

[7] In *United States v. Romaine*, this court said in pertinent part: "The intention to reserve to the Indians the possession of the land to low-water mark is made evident by the terms of the proclamation; for one of the courses on the west side of the island runs 'to the low-water mark on the shore of the Gulf of Georgia, then southerly and easterly along the said shore with the meanders thereof, across the western mouth of the Lummi River, and around Point Francis.'" 255 Fed. at 259.

pensation can and presumably will be awarded by the Commission.[8]

Our conclusion on the primary issue fully disposes of the case and renders it unnecessary to extend this opinion further by discussion of the other issues raised and argued by the parties.

Judgment affirmed.

(Endorsed) Opinion filed July 27, 1963.

FRANK H. SCHMID, *Clerk*

[8]As the trial court well said: "The defendants in the instant case purchased and substantially improved their properties in complete good faith and without the slightest knowledge, actual or constructive, of the title claim now so belatedly asserted. Whatever public atonement for early day wrongs may be due the Skokomish Indians, granting the relief sought in the present case is not justified by the evidence presented or by the law applicable thereto."

APPENDIX B

TREATY WITH THE S'KLALLAMS

January 26, 1855

Treaty between the United State of America and the S'Klallams Indians. Concluded at Point No Point, Washington Territory, January 26, 1855; Ratified by the Senate, March 8, 1859; Proclaimed by the President of the United States, April 29, 1859.

JAMES BUCHANAN

PRESIDENT OF THE UNITED STATES OF AMERICA

January 26, 1855

To All and Singular to Whom These Presents Shall Come, Greeting:

WHEREAS a Treaty was made and concluded at Hahd Skus, or Point No Point, in Washington Territory, on the 26th day of January, 1855, between Isaac I. Stevens, Governor and Superintendent of Indian Affairs for the said Territory, on the part of the United States, and the hereinafter named Chiefs, Headmen, and Delegates, of the different villages of the S'Klallams Indians, viz.: the Kahtai, Squah-quaihtl, Tch-queen, Ste-tehtlum, Tsolikw, Yennis, El-hwa, Pishtst, Hunnint, Klat-la-wash, and Oke-no, and also of the Sko-ko-mish, Too-an-hooch, and Chem-a-kum tribes occupying certain lands on the Straits of Fuca and Hood's Canal, in the Territory of Washington, on behalf of said tribes, and duly authorized by them; which treaty is in the words and figures following, to wit: Preambl

Articles of agreement and convention, made and concluded at Hahd-skus, or Point No Point, Suquamish Head, in the Territory of Washington, this 26th day of Contract Parties

January, 1855, by Isaac L. Stevens, governor and superintendent of Indian affairs for the said Territory, on the part of the United States, and the undersigned chiefs, headmen and delegates of the different villages of the S'Klallams, viz.: Kah-tai, Squah-quaihtl, Tch-queen, Stetehtlum, Tsohkw, Yennis, Elhwa, Pishtst, Hun-nint, Klatla-wash, and Oke-ho, and also of the Sko-ko-mish, To-an-hooch and Chem-a-kum tribes, occupying certain lands on the Straits of Fuca and Hood's Canal in the Territory of Washington, on behalf of said tribes, and duly authorized by them.

Cession of lands to the United States.

ARTICLE I. The said tribes and bands of Indians hereby cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied by them, bounded and described as follows, viz.: commencing at the mouth of the Okeho River, on the Straits of Fuca, thence southeastwardly along the westerly line of territory claimed by the Makah tribe of Indians to the summit of the Cascade range; thence still southeastwardly and southerly along said summit to the head of the west branch of the Satsop River, down that branch to the main fork; thence eastwardly and following the line of lands heretofore ceded to the United States by the Nisqually and other tribes and bands of Indians, to the summit of the Black Hills, and northeastwardly to the portage known as Wilkes' portage; thence northeastwardly, and following the line of lands heretofore ceded to the United States by the Dwamish, Suquamish, and other tribes and bands of Indians to Suquamish Head; thence northerly through Admiralty Inlet to the Straights of Fuca; thence westwardly through said straits to the place of beginning;

Boundaries.

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ante Treaties, p. 1.

including all the right, title, and interest of the said tribes and bands to any land in the Territory of Washington.

ARTICLE II. There is, however, reserved for the present use and occupation of the said tribes and bands the following tract of land, viz.: the amount of six sections, or three thousand eight hundred and forty acres, situated at the head of Hood's Canal, to be hereafter set apart, and so far as necessary surveyed and marked out for their exclusive use; nor shall any white man be permitted to reside upon the same without permission of the said tribes and bands, and of the superintendent or agent; but, if necessary for the public convenience, roads may be run through the said reservation, the Indians being compensated for any damage thereby done them. It is, however, understood that should the President of the United States hereafter see fit to place upon the said reservation any other friendly tribe or band, to occupy the same in common with those above mentioned, he shall be at liberty to do so. Reservation

Whites not to reside thereon

ARTICLE III. The said tribes and bands agree to remove to and settle upon the said reservation within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time, it shall be lawful for them to reside upon any lands not in the actual claim or occupancy of citizens of the United States, and upon any land claimed or occupied, if with the permission of the owner. Tribes to settle on reservation

ARTICLE IV. The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States; and of erecting temporary houses for the purpose of curing; together with the privilege of hunting and gathering Privileges to the Indians

roots and berries on open and unclaimed lands. *Provided, however*, That they shall not take shell-fish from any beds staked or cultivated by citizens.

Payments by the United States.

ARTICLE V. In consideration of the above cession, the United States agree to pay to the said tribes and bands the sum of sixty thousand dollars, in the following manner, that is to say: during the first year after the ratification hereof, six thousand dollars; for the next two years, five thousand dollars each year; for the next three years, four thousand dollars each year; for the next four years, three thousand dollars each year; for the next five years, two thousand four hundred dollars each year; and for the next five years, one thousand six hundred dollars each year. All which said sums of money shall be applied to the use and benefit of the said Indians under the direction of the President of the United States, who may from time to time determine at his discretion upon what beneficial objects to expend the same. And the superintendent of Indian affairs, or other proper officer, shall each year inform the President of the wishes of said Indians in respect thereto.

How to be Applied.

Appropriation for removal, &c.

ARTICLE VI. To enable the said Indians to remove to and settle upon their aforesaid reservations, and to clear, fence, and break up a sufficient quantity of land for cultivation, the United States further agree to pay the sum of six thousand dollars, to be laid out and expended under the direction of the President, and in such manner as he shall approve.

Indians may be removed to other reservation.

ARTICLE VII. The President may hereafter, when in his opinion the interests of the Territory shall require, and the welfare of said Indians be promoted, remove them from said reservation to such other suitable place or places with-

in said Territory as he may deem fit, on remunerating them for their improvements and the expenses of their removal, or may consolidate them with other friendly tribes or bands. And he may further, at his discretion, cause the whole or any portion of the lands hereby reserved, or of such other land as may be selected in lieu thereof, to be surveyed into lots, and assign the same to such individuals or families as are willing to avail themselves of the privilege, and will locate thereon as a permanent home, on the same terms and subject to the same regulations as are provided in the sixth article of the treaty with the Omahas so far as the same may be applicable. Any substantial improvements heretofore made by any Indian, and which he shall be compelled to abandon in consequence of this treaty, shall be valued under the direction of the President, and payment made therefor accordingly.

Lands ma... surveyed a... assigned &...

Vol. x. p. ...

ARTICLE VIII. The annuities of the aforesaid tribes and bands shall not be taken to pay the debts of individuals.

Annuities ... to be taken ... debts of individuals

ARTICLE IX. The said tribes and bands acknowledge their dependence on the government of the United States, and promise to be friendly with all citizens thereof, and they pledge themselves to commit no depredations on the property of such citizens. And should any one or more of them violate this pledge, and the fact be satisfactorily proven before the agent, the property taken shall be returned, or in default thereof, or if injured or destroyed, compensation may be made by the government out of their annuities. Nor will they make war on any other tribe, except in self defence; but will submit all matters of difference between them and other Indians to the government of the United States, or its agent, for decision, and abide thereby. And if any of the said Indians commit any depre-

Tribes to p... serve friend... relations.

to pay for depredation...

not to mak... war but m... defence.

dations on any other Indians within the Territory, the same rule shall prevail as that prescribed in this article in cases of depredations against citizens. And the said tribes agree not to shelter or conceal offenders against the United States, but to deliver them up for trial by the authorities

To surrender offenders

Annuities may be withheld from those drinking ardent spirits.

ARTICLE X. The above tribes and bands are desirous to exclude from their reservation the use of ardent spirits, and to prevent their people from drinking the same, and therefore it is provided that any Indian belonging thereto who shall be guilty of bringing liquor into said reservation, or who drinks liquor, may have his or her proportion of the annuities withheld from him or her for such time as the President may determine.

United States to establish school

ARTICLE XI. The United States further agree to establish at the general agency for the district of Puget's Sound, within one year from the ratification hereof, and to support for the period of twenty years, an agricultural and industrial school, to be free to children of the said tribes and bands in common with those of the other tribes of said district, and to provide a smithy and carpenter's shop, and furnish them with the necessary tools; and employ a blacksmith, carpenter, and farmer for the term of twenty years, to instruct the Indians in their respective occupations. And the United States further agree to employ a physician to reside at the said central agency, who shall furnish medicine and advice to the sick, and shall vaccinate them; the expenses of the said school, shops, persons employed, and medical attendance to be defrayed by the United States, and not deducted from the annuities.

Mechanics' shop

To employ a physician

Tribes to free slaves and not to acquire others

ARTICLE XII. The said tribes and bands agree to free all slaves now held by them, and not to purchase or acquire others hereafter.

ARTICLE XIII. The said tribes and bands finally agree not to trade at Vancouver's Island, or elsewhere out of the dominions of the United States, nor shall foreign Indians be permitted to reside in their reservation without consent of the superintendent or agent. Not to trade out of the United States.

ARTICLE XIV. This treaty shall be obligatory on the contracting parties as soon as the same shall be ratified by the President of the United States. When treaty to take effect.

In testimony whereof, the said Isaac I. Stevens, governor and superintendent of Indian affairs, and the undersigned chiefs, headmen, and delegates of the aforesaid tribes and bands of Indians have hereunto set their hands and seals at the place and on the day and year hereinbefore written. Signatures. January 26, 1

ISAAC I. STEVENS, *Governor and Superintendent*. [L. S.]

CHITS-A-MAH-HAN, the Duke of York, *Chief of the S'klallams*. his x mark. [L. S.]

DAH-WHIL-LUK, *Chief of the Sko-ko-mish*. his x mark. [L. S.]

KUL-KAH-HAN, or General Pierce, *Chief of the Chem-a-kum*. his x mark. [L. S.]

HOOL-HOLE-TAN, or Jim, *Sko-ko-mish sub-chief*. his x mark. [L. S.]

SAI-A-KADE, or Frank, *Sko-ko-mish sub-chief*. his x mark. [L. S.]

LOO-GWEH-OOS, or George, *Sko-ko-mish sub-chief*. his x mark. [L. S.]

E-DACH-TAN, or Tom, *Sko-ko-mish sub-chief*. his x mark. [L. S.]

KAI-A-HAN, or Daniel Webster, *Chem-a-kum sub-chief*. his x mark. [L. S.]

ETS-SAH-QUAT, *Chem-a-kum sub-chief*. his x mark. [L. S.]

KLEH-A-KUNST, *Chem-a-kum sub-chief*. his x mark. [L. S.]

HE-ATL, Duke of Clarence, S'*klallam sub-chief*. his x mark. [L. S.]

LACH-KA-NAM, or Lord Nelson, S'*klallam sub-chief*. his x mark. [L. S.]

TCHOTEST, S'*klallam sub-chief*. his x mark. [L. S.]

HOOT-OTE ST, or General Lane, S'*klallam sub-chief*. his x mark. [L. S.]

TO-TOTESH, S'*klallam sub-chief*. his x mark. [L. S.]

HAH-KWIA-MIHL, S'*klallam sub-chief*. his x mark. [L. S.]

SKAI-SE-EE, or Mr. Newman, S'*klallam sub-chief*. his x mark. [L. S.]

KAHS-SAHS-A-MATL, S'*klallam sub-chief*. his x mark. [L. S.]

S'HOTE-CH-STAN, S'*klallam sub-chief*. his x mark. [L. S.]

LAH-ST, or Tom, S'*klallam sub-chief*. his x mark. [L. S.]

TULS-MET-TUM, Lord Jim, S'*klallam sub-chief*. his x mark. [L. S.]

YAHT-LE-MIN, or General Taylor, S'*klallam sub-chief*. his x mark. [L. S.]

KLA-KOISHT, or Captain, S'*klallam sub-chief*. his x mark. [L. S.]

SNA-TALC, or General Scott, S'*klallam sub-chief*. his x mark. [L. S.]

TSEH-A-TAKE, or Tom Benton, S'*klallam sub-chief*. his x mark. [L. S.]

YAH-KWI-E-NOOK, or General Gaines, S'*klallam sub-chief*. his x mark. [L. S.]

KAI-AT-LAH, or General Lane, Jr., S'*klallam sub-chief*. his x mark. [L. S.]

CAPTAIN JACK, S'*klallam sub-chief*. his x mark. [L. S.]

HE-ACH-KATE, S'*klallam sub-chief*. his x mark. [L. S.]

T'SOH-AS-HAU, or General Harrison, S'*klallam sub-chief*. his x mark. [L. S.]

KWAH-NALT-SOTE, S'*klallam sub-chief*. his x mark. [L. S.]

S'HOKE-TAN, S'*klallam sub-chief*. his x mark. [L. S.]

PAITL, S'*klallam sub chief*. his x mark. [L. S.]

WEN-A-HAP, *S'klallam sub-chief.*	his x mark.	[L. S.]
KLEW-SUM-AH, *S'klallam sub-chief.*	his x mark.	[L. S.]
SE-ATT-HOME-TAU, *S'klallam sub-chief.*	his x mark.	[L. S.]
TSAT-SAT-HOOT, *S'klallam tribe.*	his x mark.	[L. S.]
PE-AN-HO, *S'klallam tribe.*	his x mark.	[L. S.]
YI-AH-HUM, *or John Adams, S'klallam tribe.*	his x mark.	[L. S.]
TI-ITCH-STAN, *S'klallam tribe.*	his x mark.	[L. S.]
SOO-YAHNTCH, *S'klallam tribe.*	his x mark.	[L. S.]
TTSEH-A-TAKE, *S'klallam tribe.*	his x mark.	[L. S.]
HE-ATS-AT-SOOT, *S'klallam tribe.*	his x mark.	[L. S.]
TOW-OOTS-HOOT, *S'klallam tribe.*	his x mark.	[L. S.]
TSHEH-HAM, *or General Pierce, S'klallam tribe.*	his x mark.	[L. S.]
KWIN-NAS-SUM, or George, *S'klallam tribe.*	his x mark.	[L. S.]
HAI-AHTS, John, *S'klallam tribe.*	his x mark.	[L. S.]
HAI-OTEST, John, *S'klallam tribe.*	his x mark.	[L. S.]
SEH-WIN-NUM, *S'klallam tribe.*	his x mark.	[L. S.]
YAI-TST, or George, *S'klallam tribe.*	his x mark.	[L. S.]
HE-PAIT, or John, *S'klallam tribe.*	his x mark.	[L. S.]
SLIMM, or John, *S'klallam tribe.*	his x mark.	[L. S.]
T'KLALT-SOOT, or Jack, *S'klallam tribe*	his x mark.	[L. S.]
S'TAI-TAN, or Sam, *S'klallam tribe.*	his x mark.	[L. S.]
HUT-TETS-OOT, *S'klallam tribe.*	his x mark.	[L. S.]
HOW-A-OWL, *S'klallam tribe.*	his x mark.	[L. S.]

Executed in the presence of us —

M. T. SIMMONS.

C. H. MASON, *Secretary Washington Territory.*

BENJ. F. SHAW, *Interpreter.*

JOHN H. SCRANTON.

JOSIAH P. KELLER.

C. M. HITCHCOCK, M.D.,
A. B. GOVE,
H. A. GOLDSBOROUGH,
B. J. MADISON,
F. A. ROWE,
JAS. M. HUNT,
GEORGE GIBBS, *Secretary*,
JOHN J. REILLY,
ROBT. DAVIS,
S. S. FORD, JR.,
H. D. COCK,
ORRINGTON CUSHMAN,
J. CONKLIN.

Ratification, March 8, 1859.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the eighth day of March, one thousand eight hundred and fifty-nine, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:

"IN EXECUTIVE SESSION,

"SENATE OF THE UNITED STATES, March 8, 1859.

"*Resolved*, (two thirds of the senators present concurring), That the Senate advise and consent to the ratification of treaty between the United States and the S'klallams Indians occupying lands in the Straits of Fuca and Hood's Island, in Washington Territory, signed 26th January, 1855.

"Attest: "ASBURY DICKINS, *Secretary*."

Proclamation, April 29, 1859.

Now, therefore, be it known that I, JAMES BUCHANAN, President of the United States of America, do, in pursu-

ance of the advice and consent of the Senate, as expressed in their resolution of the eighth of March, eighteen hundred and fifty-nine, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be hereto affixed, and have signed the same with my hand.

Done at the city of Washington, this twenty-ninth day of April, in the year of our Lord one thousand eight hundred and fifty-nine, and of the independence of the United States the eighty-third.

[SEAL] JAMES BUCHANAN.

By the President:

LEWIS CASS, *Secretary of State.*

APPENDIX C

SKOKOMISH RESERVE

(In Puyallup Agency, area, one-half square mile, occupied by Clallam, Twana and Skokomish, treaty January 26, 1855.)

EXECUTIVE MANSION, *February 25, 1874.*

It is hereby ordered that there be withdrawn from sale or other disposition and set apart for the use of the S'Klallam Indians the following tract of country on Hood's Canal in Washington Territory, inclusive of the six sections situated at the head of Hood's Canal, reserved by treaty with said Indians January 26, 1855 (Stats. at Large, vol. 12, p. 934), described and bounded as follows: Beginning at the mouth of the Skokomish River; thence up said river to a point intersected by the section line between sections 15 and 16 of township 21 north, in range 4 west; thence north on said line to a corner common to sections 27, 28, 33, and 34 of township 22 north, range 4 west; thence due east to the southwest corner of the southeast quarter of the southeast quarter of section 27, the same being the southwest corner of A. D. Fisher's claim; thence with said claim north to the northwest corner of the northeast quarter of the southeast quarter of said section 27; thence east to the section line between sections 26 and 27; thence north on said line to corner common to sections 22, 23, 26, and 27; thence east to Hood's Canal; thence southerly and easterly along said Hood's Canal to the place of beginning.

U. S. GRANT.

APPENDIX D

TABLE OF EXECUTIVE ORDER RESERVATIONS AND THEIR INTERPRETATION

The following table is an actual list of eight (8) reservations created in the State of Washington pursuant to treaties with the United States by Executive Orders of the President of the United States. In some of these Executive Orders the term *"too low water mark"* was included and in others subsequently litigation has included this phrase as being inadvertently left out of the Executive Orders by the respestive presidents.

In the Skokomish Treaty, which was signed in 1855 as set out in Appendix "B" herein, President U. S. Grant signed an Executive Order on February 25, 1874 (Appen-

Reservation by Exec. Order	*On Tidal Waters*	*Description Includes "Low Water Mark"*	*Court Decrees*	*Citation*
LUMMI	Yes	Yes	"EXTREME LOW WATER"	*U.S. v. Stotts*, 49 F.(2d) 619
MAKAH	Yes	Yes	No litigation	
PUYALLUP	Yes	Yes	Corrected by Exec. Order to include tidelands	Page 202, 203, 204 Exec. Orders
QUILEUTE	Yes	No	Corrected to include tidelands	*U.S. v. Moore*, 157 F.(2d) 760
QUINAIELT	Yes	Yes	No litigation	
SKOKOMISH	Yes	No	This litigation	
SWINOMISH	Yes	Yes	"TO EXTREME LOW WATER"	*State v. Edwards*, 188 Wash. 467
TULALIP	Yes	Yes	No litigation	

dix "C") some 19 years after the treaty was made with the Skokomish Tribe of Indians. The petitioner contends that leaving out the term "low water" was an inadvertent error on the part of a clerk in Washington in view of the construction of the balance of the Executive Orders creating Indian Reservations on tidal basin areas in Western Washington.

In the case of eight executive order reservations the term *"low water mark"* has been used in six of the descriptions and in three of these Reservations, the Lummi, Quileute, and Swinomish, the Courts have interpreted the description to include the tidelands to "extreme low water" so it is obvious that the terms "to low water mark" were left out of the description of the Skokomish Reservation by inadvertence. That low water mark was intended by the parties is beyond a question, since these tidelands contain some of the finest native shellfish in the world.

APPENDIX E

SMITHSONIAN REPORT FOR 1886-1887 REV. MYRON EELLS, MISSIONARY 1875 TO 1887 ON SKOKOMISH RESERVATION

THE TWANA, CHEMAKUM, AND KLALLAM INDIANS, OF WASHINGTON TERRITORY

By Rev. Myron Eells

ANTHROPOLOGICAL PAPERS

(U. S. District Court, Tacoma—No. 1183. Plaintiff's Exhibit No. 57)

Excerpts on Fishing

FISH AND OTHER MARINE ANIMALS

Five kinds of these are used as follows:

Abalone—The shells for money and ornaments.

Clam—Three kinds of clam are used for food, and the large shells are used as drinking dishes.

Codfish—The flesh and eggs of two kinds are used for food.

Crab—Two varieties are used for food.

Dogfish—Oil obtained from it; occasionally the flesh is eaten; the bones are used for ornaments, and a part of the skin is a substitute for sand-paper.

Dentalia—The shells for money and ornaments.

Flounder—Two varieties are used for food.

Halibut, Herring and Mussels—Also used as food.

Olivella—The shells used for ornaments and sometimes money.

Oyster—Food.

Porpoise—Food and oil.

Salmon, five varieties, viz., silver, dog, red, black and humpbacked—Both the eggs and flesh are used for food, and eggs for bait.

Seal (fur)—Is highly esteemed.

Seal (hair)—Buoys used in whaling, small sacks, pouches, etc., are made from the skin, oil is made from the blubber, and the flesh is eaten.

Shark—From this oil is obtained.

Smelt and Sea-egga—Used as food.

Scallop—The shells are used for rattles in tamanousing, and the flesh for food.

Skate and Trout—Food.

Whale—Furnishes food and oil, bones for war clubs, sinew for thread, and whale bone for a part of the cod-fish hook.

Cuttlefish—Food.

CULTURE

(29 Species of Fish.)

(From Tidal Waters)

Means of subsistence—Food formerly consisted solely of fish, roots, berries, and game, the spontaneous products of land and water.

The fish and marine mammals formerly used are still eaten, and are of at least nineteen kinds, namely, two vari-

eties of codfish, two of flounders, five of salmon, the silver, dog, red, black, and humpbacked, and one each of dogfish, smelt, skates, hair-seal, trout, whale, halibut, herring, porpoise, and cuttlefish. The dogfish is used only occasionally when other food is scarce. The salmon, halibut herring, and smelt are dried as well as eaten fresh, the salmon being split open and the backbone being taken out. The halibut is cut into strips, and the herring and smelt are dried whole. Salmon are now also sometimes salted. Besides the flesh of the dogfish, porpoise, seal, and whale the oil was formerly eaten. The eggs of the codfish and salmon are a luxury. The porpoise, from its resemblance to pork, is called Indian pork.

Ten kinds of shellfish are used for food, four of them being different varieties of clams, two of crabs, and one each of oysters, mussels, sea eggs, and scallops, the latter two being found only in the Klallam waters. Clams alone are dried. In drying them the Indians first built a large fire in which they heat a number of stones, and when the fire has nearly burned down, they remove the coals, pour on the clams, perhaps bushels of them, and cover the whole with several thicknesses of mats. They are thus steamed until they are cooked and opened, when they are taken from the shell, spitted on slender sticks 2 or 3 feet long, and put over fires in their houses to dry.

Fish eggs are dried by being placed on small wooden frames, a foot or two square, and placed over the fire. Salmon was formerly their staff of life, and their chief business in the summer was to dry it for winter. There are some kinds of fish in their waters all the year round, though some varieties they do not eat unless food is scarce.

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IN THE

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OCTOBER TERM 1963

No. 703

SKOKOMISH INDIAN TRIBE, *Petitioner*,

vs.

E. L. FRANCE, Trustee;
CITY OF TACOMA; et al, *Respondents*

BRIEF OF RESPONDENT CITY OF TACOMA OPPOSING PETITION FOR WRIT OF CERTIORARI

MARSHALL MCCORMICK
ROBERT R. HAMILTON
PAUL J. NOLAN
Attorneys for Respondents

345 County-City Building
Tacoma, Washington 98402

LORIMER & LANGLOW, INC., PRINTERS, TACOMA

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PAUL J. NOLAN
Attorneys for Respondents
345 County-City Building
Tacoma, Washington 98402

LORIMER - LAYOLOR, INC., PRIN. ERS. TACOMA

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

It appears to the Respondent City of Tacoma, a municipal corporation, that corrections of several discrepancies and omissions in the statement of the case as set forth in the Petitioner's petition would be appropriate and advisable.

The first matter which we would call to the attention of the Court is the misnomer in the heading of the petition wherein the Petitioner is designated as "Skokomish Tribe of Indians." Throughout this entire litigation, commencing with the filing of the Petitioner's

complaint in 1948 through the opinion of the Circuit Court of Appeals for the Ninth Circuit in July of 1963, the Petitioner has been known and designated as "Skokomish Indian Tribe." The record is clear that, in fact, the Petitioner is not a loosely-knit group of individuals belonging to an Indian tribe, as the heading of the Petition would indicate but, rather, it is a corporation duly organized and existing under and pursuant to the laws of the United States under an Act of Congress (48 Stat. 984, as amended by the Act of June 15, 1935, 49 Stat. 378), which fact was recognized by the Court of Appeals in its decision, wherein the Court commenced its opinion as follows:

> "Appellant, an Indian tribe incorporated under an Act of Congress, * * *"

The second erroneous impression that one receives in reading the Petition for Writ of Certiorari on file herein is that the Court is to be concerned with fishing and fishing rights, whereas in fact this issue was not presented to either the District Court or the Court of Appeals, nor was it an issue at all in the proceedings. Here, again, the Court of Appeals recognized succinctly the problem involved wherein it concluded the first sentence in its opinion following the portion set forth above, as follows:

> "* * * *brought this action to establish a claim of title to a strip of tidelands* adjoining its reservation on the Hood's Canal and the Skokomish River in Western Washington * * *" (Emphasis added.)

We emphasize again that the only question before the court is whether or not the Indian tribe *can claim title in fee* to the tidelands abutting the described portion of the original reservation (the uplands having been privately owned for many years, title deraigned from original government patents) when the treaty, executive order, and the use by the Indians of these particular tidelands are all considered.

A reading of this petition would lead one to believe that the deprivation of the particular tidelands abutting the reservation would, in fact, deprive the Indian tribe of valuable fishing rights, particularly with reference to the collection of shellfish. Nothing could be further from the truth as disclosed by the evidence introduced by the trial court and as considered by the Court of Appeals.

The evidence before the trial court indicated clearly that the Skokomish tribe in the early days ranged up and down the canal many miles procuring food, both salmon and shellfish. Indeed, it was established conclusively and convincingly, that the usual locations at which shellfish were procured were miles from the reservation—the Indians traveling to these distant places in canoes. The tideland strip in question was not, nor has it ever been, an abundant source of shellfish for the reason that the emptying of the Skokomish River into the salt waters of Hood's Canal affected the salinity of the tidelands to such an extent that shellfish growth was severely restricted.

This litigation was determined basically upon factual determinations made by the trial court where, in its affirming language, the appellate court stated:

> "* * * After reviewing the record in its entirety, it is our conclusion that the findings are not clearly erroneous, but, on the contrary are amply supported by the evidence.
>
> "The use of the tidelands by the Indian tribe, as disclosed by the evidence, does not support appellant's contention that the tidelands were essential to the Indians' livelihood and that the Indians accordingly must have understood that they were to have the tidelands * * *"

With these three basic impressions corrected and clarified generally, the Respondent City of Tacoma supplies this additional information by way of counter-statement of the case.

The Respondent City of Tacoma owns a portion of the tidelands in question, utilizing the same as a part of the tailrace of a hydroelectric project and a part for the construction of transmission lines from its hydroelectric generating plants on the Skokomish River to the substations located within its corporate boundaries. This hydroelectric generating plant is duly licensed under the laws of the United States, acting by and through the Federal Power Commission, and it received Federal Power Commission approval upon all parts of its installation.

We would seriously dispute the statement made on p. 4 of the Petition under the heading "Statement of

the Case," that the decision of the Court of Appeals has created a serious and real conflict with the long line of cases of this Court. The instant case is clearly distinguishable on its facts alone from all other cases heretofore decided, the distinguishing factual determination being that there was no element of necessity insofar as the ownership of the tidelands in question is concerned.

OBJECTIONS TO REASON NO. 1

The Respondent City of Tacoma disputes Reason No. 1 set forth on pp. 4 and 5 of the Petition. This Respondent will admit that the salt water and the shorelands and tidelands abutting portions of the salt water generally were a source of aboriginal livelihood of the Indians in the early days. However, it does not necessarily follow that each and every inch of tidelands and shorelands constituted a source of aboriginal livelihood. The evidence in this case clearly supported the finding of the trial court that the specific tidelands in question did not, in fact, amount to a source of livelihood, but on the contrary that because of the salinity of the water as influenced by the large amount of fresh water from the Skokomish River washing the tidelands twice a day, that shellfish were not numerous in the tidelands in question.

The court further found from the testimony (including the experts' relied on by the Petitioner), which was uncontroverted, that the Skokomish Indians, in fact, went many miles away from the reservation in order to collect shellfish. They would travel most of the

summer season, starting near Belfair at one extremity of the Canal and traversing over many months the entire length of Hood's Canal in order to find specific locations. The Petitioner's fears of the scope and magnitude of the decision of the Court of Appeals is greatly magnified. In the last analysis, all that this decision means is that where there is a factual determination that the Indians in early times did not use tidelands abutting their reservation, that the tidelands were not necessary or important in the procuring of their food and sustenance, that such tidelands will not ipso facto become a part of the reservation, merely because they happen to abut a described line of the reservation. How this case can affect situations in other areas is certainly subject to specualtion, and a reversal of the opinion of the Court of Appeals could clearly create as many problems, if not more problems, as an affirmance.

OBJECTION TO REASON NO. 2

The Respondent City of Tacoma takes issue with Reason No. 2 and respectfully submits that the decision of the Circuit Court is not only correct but is consistent with prior decisions of the Ninth Circuit Court of Appeals, and that the distinguishing of prior decisions based upon factual determinations is the proper exercise of judicial discretion. To follow the Petitioner's line of reasoning would be to say that if a plaintiff has recovered in ten law suits, it necessarily follows that, in the interests of consistency, the plaintiff must recover in the eleventh law suit, irrespective of the factual situation.

OBJECTION TO REASON NO. 3

Petitioner, in setting forth Reason No. 3 on p. 6 of his petition, has assumed a finding by the Court which the trial court and the appellate court clearly rejected; that is, that the tidelands were a necessary and imperative adjunct to the aboriginal subsistence.

There is, in the decision of t Court of Appeals, no conflict with the rules of construction which have heretofore been established, nor can there be imputed from its opinion holding that all doubt must be resolved in favor of the state and against the Indian.

As we have repeatedly said, this case primarily involves a question of fact and the Petitioner has not as yet recognized that factual determination.

OBJECTIONS TO REASON NO 4

The language of the Petitioner's Petition contained on p. 7 once again indicates the Petitioner's complete disregard for the evidence and findings of the Court. A reading of the Petition would connotate Indian aboriginal use of these particular tidelands for ninety per cent of their food, with twenty-nine species of fish. We point out, once again, repetitious as it may be, that the area in question was not utilized by the Indians in early days for sustenance nor was it adapted for the propagation and growth of shellfish. We emphasize again that the evidence before the trial court, both the Indians who testified in person and the documentary evidence, clearly established that the Indians in the

early days ranged far from the reservation in order to obtain the shellfish which they desired.

The evidence further indicates that shellfish was not a primary source of food, but merely a delicacy. That their primary food was the salmon, caught either in the Skokomish River itself by a process of nets, or upon the open waters of Hood's Canal utilizing Indian canoes.

The Petitioner would further have the Court believe that fishing rights were involved in this proceeding, when, in fact, such is not the case. This proceeding involved only the question of title to the tidelands in question. It may well be, although not before the Court, that the Indians have the right to fish upon and over the tidelands in question; but such a right does not ripen into a fee title. There was clearly reserved to the Indians the right of fishing at usual and accustomed grounds and stations, and such a right is not inconsistent with the position of the Respondent City of Tacoma but, rather, consistent with its position. Should the Court decree that the only grounds and stations that the Indians could fish would be on the tidelands immediately abutting the reservation, then the Indians' meals consisting of fish and shellfish would be scanty and infrequent indeed.

OBJECTIONS TO THE ARGUMENT OF PETITIONER AND COUNTERARGUMENT

The Respondent can make no better argument in support of its position than to adopt the language found in the opinion of the Court of Appeals, where the Court of Appeals, in distinguishing the prior cases referred to by Petitioner, stated:

> "The distinction between those cases and the instant case is one of fact and readily apparent. Here the trier of facts has found, *upon substantial evidence*, that the tidelands *were not essential* to the livelihood of the Indians at the time of the treaty and the executive order providing for the reservation. It is clear from the record that the reservation was not intended to support these Indians, as was the case in *Alaska Pacific Fisheries v. United States*, or to be 'sufficient for their wants,' as was the expressed intention of the treaty in *United States v. Moore*." (Emphasis added.)

Indeed, the evidence relied on by the Petitioners at the trial Court and considered by the Court of Appeals in its opinion indicated that the clam digging for shellfish started in May at the head of Hood's Canal and continued throughout the summer, the Indians moving from one end of the Canal to the other in order to obtain the shellfish, and that the majority of the sites — indeed, all but an insignificant number of sites identified by Professor Elmendorf in his work—were located, not on tidelands adjacent to the reservation, but at places and locations far removed from the confines of the reservation as established by the treaty and executive order.

An assertion by the Petitioner that the tidelands in question were necessary and an imperative adjunct to the "aboriginal subsistence" does not make it so and, in fact, nothing is further from the truth.

The Respondent submits that the Petitioner has submitted to the Court a petition consisting of rules of construction taken from prior decisions and applied the same to an assumed hypothetical factual situation, which assumed hypothetical situation is contrary to the factual situation before the trial Court, contrary to the record before the Court of Appeals for the Ninth Circuit and contrary to any facts which could be elicited upon a retrial of this cause.

The Respondent City of Tacoma respectfully submits, therefore, that the writ of certiorari should be denied and that the decision of the trial Court as affirmed by the United States Court of Appeals for the Ninth Circuit, based upon solid evidentiary facts, be sustained.

Respectfully submitted,

MARSHALL MCCORMICK
ROBERT R. HAMILTON
PAUL J. NOLAN

Attorneys for Respondents
CITY OF TACOMA

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FEB 24 1964
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v.

E. L. FRANCE, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN E. RYAN, JR.
RAYMOND C. SWANSON
RYAN, ASKREN, CARLSON, BUSH & SWANSON,
545 Henry Building
Seattle, Washington
Counsel for Respondent
Simpson Logging Company

Of Counsel:
F. JOSEPH DONOHUE
DONOHUE, KAUFMAN & SHAW
Judiciary Square, 503 D St. N.W.
Washington, District of Columbia

METROPOLITAN PRESS AND WESTERN SEATTLE, WASHINGTON

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Respondent Simpson Logging Company opposes the issuance of a writ of certiorari. The decision herein properly turned on factual determinations. The Trial Court, after thoroughly considering the evidence, found against petitioner's contentions and entered findings accordingly. The Court of Appeals reviewed the record and found the findings to be supported by substantial evidence. This is not an appropriate instance for the Supreme Court to exercise its discretion under Rule 19 by writ of certiorari to review the case further.

CITATIONS TO OPINIONS BELOW

The unpublished memorandum opinion of the District Court from which the petitioner appealed is contained in the record herein. The opinion of the Court of Appeals

for the Ninth Circuit is printed as Appendix A to the Petition for Writ of Certiorari and is reported at 320 F.(2d) 205 (1963).

JURISDICTION

In addition to petitioner's statement, it should be noted that the time for filing all responses to the Petition for Writ of Certiorari was extended to February 24, 1964, by John F. Davis, clerk, United States Supreme Court.

QUESTIONS PRESENTED

1. Should the Supreme Court exercise its discretion by way of a writ of certiorari to review a case where there have been concurrent findings of fact by the Trial Court and the Court of Appeals and agreement by the two courts as to proper application of the rules of construction of treaties to the facts so determined?

2. Does the mere fact that the result was unfavorable to the Indians (petitioner) justify the assumption that both of the courts below incorrectly applied said rules of construction?

STATUTES INVOLVED

The pertinent treaty between the Indians and the United States of America was entered in on January 26, 1855, ratified March 8, 1859, and proclaimed April 29, 1859 (12 Stats. 933). The Executive Order was signed by President U. S. Grant and dated February 24, 1874. The Washington Enabling Act is found at 25 Stats. Chapter 180, Page 676.

STATEMENT OF THE CASE

This action was brought to quiet title to a narrow strip of tidal land abutting the original Skokomish Indian reservation. The tidal strip is bordered on the land side by the private property of respondents and on the water side by public navigable water. The strip has no value except to the abutting upland respondent owners, whose ownership of the uplands is not in question, as a means of access to navigable water. The abutting uplands were legally allotted to Indians and legally conveyed by them, with government approval, to and vested in respondents and their predecessors in title (Fdg. 9). There is no longer any Indian or reservation land along any of the waterfront and, accordingly, petitioner and its members do not have any access to the strip except via the water (Fdgs. 10 and 11).

Respondent Simpson Logging Company is only concerned with a stretch of tideland located in Section 26, which is a particularly narrow and rocky stretch of tideland (Fdg. 21). Section 26 has a separate and different history, having been part of the Fisher homestead and not part of the original reservation. The Fisher donation claim was added to the reservation by purchase and it is this respondent's contention that the tidelands were not included.

Prior to the commencement of this action in 1948, petitioner and its members did not assert title to any of the tidelands in controversy. The State of Washington began selling the tidelands about 1901 to respondents and their predecessors in title who have occupied the

lands continuously since their acquisition, have paid taxes thereon, and have made extensive improvements upon portions of the land (Fdgs. 25 through 30, inclusive, and 37).

As noted by both the trial and appellate courts, it was conceded that neither the treaty nor the executive order expressly included the tidelands at issue as part of the reservation. The petitioner, however, sought to show that the tidelands were essential to the Indians' livelihood and hence the parties at the time of the treaty must have intended them to be part of the reservation. The contention involved not only the issue of intent, but also the underlying issues of whether the tidal strip could or ever did contain usable quantities of shell fish, and whether the Indians were dependent upon or derived material subsistence therefrom.

The Trial Court, after hearing a wide range of testimony and evidence, expressly found against such contention of petitioner and made extensive findings of fact. The Court of Appeals, after a careful review of the record in its entirety, stated:

> "... it is our conclusion that the findings are not clearly erroneous, but, on the contrary, are amply supported by the evidence."

The tidal strip has never been and is not now a source of shell fish in usable quantities (Fdgs. 20, 21 and 31). The low salinity in this particular locale explains why the shell fish and marine life of interest to Indians was found several miles distant from this tidal strip (Fdgs. 19 and 22). Outside of berries and deer the Indians depended

primarily on salmon caught in the Skokomish River, which is the only salmon river entering Hood Canal passing through the reservation (Fdgs. 14, 15 and 17). The livelihood of the Indians was not dependent in material degree upon shell fish or any type of fishing on or from the tidelands in issue (Fdg. 18).

Factually, it should be noted that this action does not involve "fishing rights." The treaty involved states in Article IV thereof:

> "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States . . ."

No one has challenged the Indians' rights to exercise the privileges granted by Article IV of the treaty, and no issue in this case involves that consideration. This is solely an action to try title to a submerged tidal strip.

This case has been fully and competently tried and reviewed by the courts below and should not be reviewed again by way of writ of certiorari.

ARGUMENT

The petitioner under the heading "Questions Presented" raises two questions. The first question deals with the intent of the parties to the treaty and is in essence a question of fact. The Trial Court found against petitioner's contentions and entered findings accordingly. The Court of Appeals reviewed the record and found the findings to be supported by substantial evidence. Accordingly, this is not an appropriate instance for the Supreme Court to exercise its discretion by writ of certiorari to review

the case further. As stated by the Supreme Court in *Graver Mfg. Co. v. Linde*, 336 U.S. 271 (1949) at page 275:

> "A court of law, such as this court is, rather than a court for correction of errors in fact, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

The second question, as stated by petitioner, creates some confusion since in the five cases cited on pages 2 and 3 of its brief there are five errors, either with respect to the case name or the page citation. Furthermore, it does not actually state a question and two of the cases cited at this point are not mentioned in petitioner's argument portion of the brief. In any event, it appears petitioner is questioning whether the Court of Appeals properly applied the correct rules of construction to the treaty and the executive order. A reading of the Court of Appeals' opinion clearly shows the court fully understood the proper rules of construction and, in light of the findings of fact, correctly applied them in reaching its decision.

Next, we will address ourselves to the "Reasons" stated by petitioner for granting certiorari and their argument in support thereof. In the first and second Reasons it is contended there is an inconsistency between the decision herein and prior decisions of the United States Supreme Court and the Ninth Circuit Court of Appeals. Petitioner states "the first issue before the court below concerns the intention of the Indians and the United States when they held the treaty conference in 1855 . . ."

This is a factual question which has been thoroughly reviewed by both courts below. Any apparent inconsistency in results between this and other cases is fully explained by the difference in facts. Accordingly, the decision herein does not have the far-reaching effect asserted by petitioner, but rather is only of major importance to these litigants. As stated in *United States v. Stotts*, 49 F.(2d) 619, 621 (1930) (a case cited by petitioner in Appendix D):

> "Each treaty and proclamation must rest upon its own provisions."

The principal cases apparently relied upon by petitioner in support of Reasons 1 and 2 are *Moore v. United States*, 157 F.(2d) 760 (1946); *Northern Pacific Railway Co. v. United States*, 227 U. S. 355 (1913), and *United States v. Winans*, 198 U. S. 371 (1905). The first two cases were specifically and clearly distinguished by the Court of Appeals in its opinion on the basis of the facts involved. (See pages 30 and 31 of the Petition for Writ of Certiorari herein.) The *Winans* case is properly distinguishable on the same basis. There, fishing rights were involved and the Indian was being deprived of his right to take fish at the usual and accustomed places. This is far different from the facts involved herein, as noted in the Statement of the Case.

Appendix D used by petitioner in support of reason No. 1 is inconclusive and misleading. The appendix is not part of the record, having been presented for the

first time in the petition, and should not be considered by the court unless a full and comprehensive analysis is made of all of the treaties and reservations in the Pacific Northwest bordering tidal water. If such an approach truly has merit, the table (Appendix D) should have been prepared and presented at the time of trial.

In any event, it should be noted that Appendix D only refers to three cases outside of the present one. In two of the cases the description specifically included the low water mark and the third decision was based on the phrase, "sufficient for his wants," together with a factual pattern of use and need for the tidelands. This latter case, *Moore v. United States*, 157 F.(2d) 760 (9th Cir. 1946), was specifically distinguished by the Court of Appeals in this case. (See page 30 of the Petition for Writ of Certiorari.)

The 3rd and 4th Reasons stated by petitioner relate to the rules of treaty construction. The petitioner has cited several cases in this regard, but has failed to direct the court's attention to more recent United States Supreme Court decisions which clarify and set forth the rules of construction. These cases, namely, *Choctaw Nation v. United States*, 318 U. S. 423 (1943); *Ute Indians v. United States*, 330 U. S. 169 (1947), and *Shoshone Indians v. United States*, 324 U. S. 335 (1945), were cited by the Court of Appeals. In its opinion, the Court of Appeals specifically quoted the following portion of the Supreme Court's opinion in the *Choctaw Nation* case, *supra*:

"Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. (Citing cases.) Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed, so far as possible, in the sense in which the Indians understood them, and 'in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people.' (Citing cases.) *But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.* (Citing cases.) (Emphasis supplied.)" (320 F.(2d) at page 207 and page 20 of Petition for Writ of Certiorari—Appendix A.)

and the following portion of the Supreme Court's opinion in the *Shoshone Indians* case, *supra*:

"Petitioners suggest that in the construction of Indian treaties we, as a self-respecting nation, hesitate to construe language, which is selected by us as guardian to the Indians, to our ward's prejudice. 'All doubts,' say petitioners, 'must be resolved in their (the Indians') favor.' Mr. Justice McLean, concurring in *Worcester v. Georgia*, 6 Pet. 515, at 582, said, 'The language used in treaties with the Indians should never be construed to their prejudice.' But the context shows that the Justice meant no more than that the language should be construed in accordance with the tenor of the treaty.[16] That, we think, is the rule which the court has applied constantly to Indian treaties. We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the

United States and the Indians, is for the Congress."[17] (320 F.(2d) 205 at 207 and 208, and page 21 of Petition for Writ of Certiorari—Appendix A.)

"16. This is the meaning of the other cases which were cited by petitioners upon this point, *Jones v. Meehan*, 175 U. S. 1, 10-12; *United States v. Winans*, 198 U. S. 371, 380; *Marlin v. Lewallin*, 276 U. S. 58, 64; *United States v. Payne*, 264 U. S. 446, 448-49; *Northern Pacific R. Co. v. United States*, 227 U. S. 355, 366; *Scufert Bros. Co. v. United States*, 249 U. S. 194, 198; *United States v. Shoshone Tribe*, 304 U. S. 111, 116; see also *Tulee v. Washington*, 315 U. S. 681, 684."

"17. *United States v. Choctaw Nation*, 179 U. S. 494, 534-36; *Choctaw Nation v. United States*, 318 U. S. 423, 432."

(NOTE: The above footnotes have been taken from the Supreme Court's opinion, 324 U. S. 335 at page 353, and inserted at the appropriate place in the Court of Appeals' opinion.)

In reading the above portion of the Supreme Court's opinion in the *Shoshone* case, *supra*, the footnote citations thereto should be noted since they include a majority of the cases cited by petitioner in this connection. The only more recent case cited is *Hynes v. Grimes Packing Co.*, 337 U. S. 86 (1949), a case which is not relevant here. The *Hynes* case involved an Indian reservation in Alaska which was created pursuant to the Act of Congress of May 1, 1936 (49 Stat. 1250) wherein certain tidelands and coastal waters extending 3,000 feet from the shoreline at mean low tide were *specifically* granted. The question was whether the phrase "public lands" used in the Act prohibited the granting of tidelands and coastal waters.

It appears clear that in the case now before this court the Court of Appeals fully recognized the proper rules of construction to be applied to treaties. However, the petitioner attempts to evade this by referring again to older declarations by the Supreme Court and ignoring the more recent ones which clarify the rules of construction. Certainly, petitioner is in error and is unwarranted in

making the following statement:

> "Another reason that certiorari should be granted is that the Circuit Court has erroneously applied the rules of treaty construction and *has completely* ignored prior cases determined by the Supreme Court . . ." (Page 6 of the Petition for Writ of Certiorari.) (Emphasis supplied.)

Petitioner seems to reason that, since the decision was unfavorable to the Indians, the rules of construction must have been erroneously applied. In doing so, petitioner continues to ignore the importance of the facts as determined by the court.

When one considers the findings of fact made by the Trial Court and approved by the Court of Appeals, it becomes clear that the rules of construction were correctly applied. As stated by the Court of Appeals:

> "The use of the tidelands by the Indian tribe, as disclosed by the evidence, *does not* support appellant's contention that the tidelands were essential to the Indians' livelihood and that the Indians accordingly must have understood they were to have the tidelands." (Emphasis supplied.) (320 F.(2d) 205 at page 210 and pages 25-26 of the Petition for Writ of Certiorari—Appendix A.)

An illustration of petitioner's completely ignoring the importance of the facts, as determined by the court, is the following unwarranted conclusion stated on page 6 of the Petition for Writ of Certiorari:

> "The court below has judicially legislated that, if a necessary and imperative adjunct to the aboriginal subsistence is not precisely described by metes and bounds, it is not a part of the reserve and all doubt

must be resolved in favor of the State and against the Indian."

First, the evidence clearly established that the tidelands in question were not "a necessary and imperative adjunct to the aboriginal subsistence" for many reasons, not the least of which is that the Indians' existence depended primarily upon fishing in the Skokomish River. Further, to the extent that the Indians depended on Hood Canal, they were not restricted to the reservation or the abutting tidelands, but rather, by Article IV of the treaty, they were guaranteed their right to take fish at their usual and accustomed grounds and stations throughout Hood Canal in common with all citizens of the United States. Second, the court did not resolve doubts in favor of the state, but rather based its opinion strictly on the evidence presented. This is clearly shown by the following summary portion of the Trial Court's memorandum opinion, which was quoted with approval by the Court of Appeals:

"Allowing in full measure for the inequalities of understanding and position of the parties negotiating the treaty and giving full effect to the rules of treaty construction favoring the primitive Indians, on the entire record in the present case, this court is fully satisfied that not any one of the parties negotiating the treaty of 1855 had the slightest thought or intention that the treaty or the executive order to follow would vest ownership to the tidelands in question in the Skokomish or in any other Indian tribe. On the contrary, the record of negotiations, the language and substance of the treaty, the specific terms of the executive order, and all pertinent circumstances shown by the evidence negative understanding or intent to such effect by any of the parties negotiating the treaty or concerned with or by the order. Considering the absence of support for any such con-

> tention, the long delay in any mention or assertion thereof is not surprising." (320 F.(2d) 205 at page 212 and page 29 of the Petition for Writ of Certiorari —Appendix A.)

Petitioner tries to avoid the above by making the following statement on pages 10 and 11 of the petition:

> "It is, to us, an untenable construction to place upon this treaty to say that the means of ingress and egress from the land to the water is cut off by an invisible line imposed by the treaty."

Even if the Indians owned the tidelands, they cut off any access by land when they sold the abutting upland allotments to the appellees or their predecessors in title with the government's approval. Such action is more consistent with the following: (1) the Indians did not consider themselves as the owners of the tidelands in question, and (2) said tidelands were not of importance to the Indians.

Not only did petitioner fail to meet its burden of proof, but the courts below found the evidence to be to the contrary. The basic question of intention was a factual issue to be determined by the court in light of all of the surrounding circumstances. This has been thoroughly considered and determined by the Trial Court and reviewed by the Court of Appeals. Accordingly, this case does not need to be reviewed by the United States Supreme Court by Writ of Certiorari.

As pointed out in the quotations used by the Court of Appeals, the court will attempt to determine what the parties meant by the treaty, but will stop short of varying

its terms to meet alleged injustices. The latter is a matter for Congress. If, in fact, the petitioner tribe was not adequately provided for by the treaty and executive order, this matter can presumably be rectified by the Indian Claims Commission, before whom the petitioner tribe presently has a claim pending. As the Trial Court properly raised in its memorandum opinion:

> "The defendants in the instant case purchased and substantially improved their properties in complete good faith and without the slightest knowledge, actual or constructive, of the title claim now so belatedly asserted. Whatever public atonement for early day wrongs may be due the Skokomish Indians granting the relief sought in the present case is not justified by the evidence presented or by the law applicable thereto." (320 F.(2d) 205 at 213 and page 32 of the Petition for Writ of Certiorari—Appendix A.)

The petition for a writ of certiorari herein should be denied.

Respectfully submitted,

JOHN E. RYAN, JR.
RAYMOND C. SWANSON
Counsel for Respondent Simpson Logging Company

F. JOSEPH DONOHUE
of Counsel

February 21, 1964

Office Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 703

SKOKOMISH INDIAN TRIBE, a corporation, *Petitioner*,
vs.
E. L. FRANCE, *et al.*, *Respondents*.

BRIEF IN OPPOSITION TO CERTIORARI

WILLIAM E. EVENSON
Counsel for Respondents
Hulda S. Carlson, et al.

WILLIAM E. EVENSON of
SKEEL, McKELVY, HENKE, EVENSON & UHLMANN
1020 Norton Building
Seattle 4, Washington 98104

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In the
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SKOKOMISH INDIAN TRIBE, a corporation,	*Petitioner,*	No. 703
vs.		
E. L. FRANCE, *et al.*,	*Respondents.*	

BRIEF IN OPPOSITION TO CERTIORARI

Respondents Carlson, Strine, Greeley, Macke and Phillips oppose the issuance of a writ of certiorari herein. The decision below is not one properly reviewable under any considerations expressed in Rule 19, nor the practices of the court, nor is this a case in which such relief is needful or appropriate.

This case involved a factual controversy and has been disposed of below on findings of fact which petitioner prefers to ignore.

COUNTER STATEMENT OF THE CASE

We regard petitioner's statement of the case as inadequate and actually embracing matters outside the record.

We have none of the record as now constituted available to us nor any knowledge of its paging. Hence, all references here are to the Transcript of Record as we understood it was filed with the Court of Appeals, and to the exhibits as they were marked in the District Court. Exhibit numbers with a prefix "A" signify exhibits offered by defendants below.

This action was brought by an incorporated Indian Tribe (Tr. 6) constituted under an Act of Congress with power to sue and be sued. Ex. 1; Art. 5(i). The action was not brought by Indians as such nor by any aboriginal group nor by incompetents. The corporation instituted and maintained this action in its own name for its own account.

It is erroneous to suggest in the caption or in the petition that this proceeding involves any petitioner other than the corporation.

This action was brought to quiet title (Tr. 23) to a narrow strip of "tidal land" (Fdg. 21; Tr. 93) which is alternately submerged and exposed with each turn of the tide twice a day and has been from time immemorial.

The strip is of no value except to the abutting upland owners as a means of access to navigable water. The upland ownership by respondents is not in question. The tidal strip is bordered on the land side by the private property of respondents and on the water side by public navigable water. If the strip were not owned by respondents it would be only a basis for extortion against respondent upland owners. Petitioner owns none of the abutting uplands and would have no access to the strip except via the water, and then only if the tide was out. Fdgs. 9, 10, 11; Tr. 91.

The theory of petitioner's action was that the legal description of the land formerly comprising the Indian reservation as set forth in the Executive Order creating the reservation (Ex. 4) expressly included the tidal strip and hence the title to the strip should be quieted in

the incorporated petitioner as some form of successor to the original tribes which were settled upon the reservation pursuant to the Executive Order. Neither the Treaty (Ex. 3) nor the Executive Order included the tidal strip in the reservation. Fdgs. 2, 3, 4, 7, 23, 24; Tr. 89. The exact exterior boundaries of the reservation were surveyed, marked out, and documented in 1862 as the 1855 Treaty stated would be done. Fdgs. 4, 33, 34; Ex. A-14-1, attachment "B"; Also Ex. A-9, 6, 45. The abutting uplands have long since been regularly disposed of by Indian allottees and there is no Indian or reservation land along any of the waterfront. Fdgs. 9, 10, 11; Tr. 91.

This action does not and never has involved "fishing rights." The Treaty relied upon by petitioner in Article 4 thereof says:

> "The right of taking fish at usual and accustomed grounds and stations is further secured to said Indians, in common with all citizens of the United States . . .".

No one has challenged any rights of Indians to exercise any privileges granted by Article 4 of the Treaty. No issue in this case involves that consideration. This is solely an action to try title to a submerged tidal strip.

This is not a case involving "shellfish beds." The strip of submerged land abutting respondents' upland is a narrow, rocky, gravelly strip (Fdg. 21; Tr. 93; Ex. A-3-7) and not a source of shellfish in usable quantities. Fdgs. 20, 22, 31.

This case has never involved North Pacific Coast, Alaska, or other Indians.

Petitioner being unable to establish the tidal strip to be within the limits of the described and established reservation area sought to have the trial court speculate and infer that perhaps the tidal strip had contained sufficient edible shellfish in 1855 or 1874 to have constituted a necessary part of the subsistence and economy of the aboriginal Indians and hence should have been indispensably an appurtenance of the reservation. An issue of fact on this proposition was made at the beginning of this action and maintained throughout. See particularly the Pretrial Order No. 16008—Tr. 85, 86, 97, 99. The issue was not only whether this tidal strip could or ever did contain usable quantities of shellfish, but also whether these or any Indians ever were dependent upon or derived material subsistence therefrom. The trial court after hearing a wide range of testimony and evidence, including all the hearsay that petitioner could muster, expressly found against such contention of petitioner. Fdgs. 14-20; Tr. 92-93. In Finding 16, Tr. 92, line 23, please correct the exhibit number to 62, rather than A-62. This tidal strip has never been and is not now a source of shellfish in usable quantities. Fdgs. 20, 21; Tr. 93; Fdg. 31; Tr. 95. The nature of this particular locale of low salinity (Fdg. 22; Tr. 92) explains why shellfish and marine life of interest to Indians were found several miles distant from this tidal strip. Fdg. 19; Tr. 93; Ex. A-62. Thus this issue could not blithely be disposed of by conjuring up "judicial knowledge" that Indians were known to eat fish.

The respondents on whose behalf this brief is sub-

mitted are concerned only with the tidal strip along the northerly $^5/_8$ of a mile, approximately, of the former reservation in Section 26. In Section 26 the tidal strip is specially narrow, rocky and gravelly. Fdgs. 20, 21; Tr. 93; Ex. A-3-7.

The main highway, U.S. 101, skirts the Hood Canal area and traverses the Indian Reservation. Ex. A-48, A-62. All the land in Section 26 between the highway and the waters of Hood Canal have long also been legally allotted to Indians and legally conveyed by them with government approval to and vested in respondents and their predecessors in title. Fdgs. 9, 10, 11; Tr. 91.

Section 26 with which these respondents are concerned also has a separate interesting and pertinent history showing its inclusion in the reservation only by separate and later proceedings. It was purchased by the government from a homesteader Fisher pursuant to a special Congressional appropriation for addition to the reservation, and was not carved out of the public domain, as was the balance of the reservation. Fdg. 5; Tr. 90; Fdg. 23; Tr. 93-4; Ex. A-14-1, A-14-2, A-14-3 and A-14-4.

OBJECTIONS TO REASONS NO. 1 AND 2

Respondents object to petitioner's so-called Reasons No. 1 and 2 for the issuance of the writ. These seem to be grounded upon a supposed "intention" of the negotators of the Treaty. The Court of Appeals disposed of this contention in part by quoting a memorandum decision of the trial court of January 22, 1962 (R. 222)

which quotation in the Court of Appeals opinion appears at page 29 of the pending petition.

The factual issue as to intention was tried out at length and resulted in Findings 5, 7, 34 and 24 that nothing in any records or information leading to the establishment of the reservation reflected any intention to include the submerged tidal strip in this particular reservation.

Appendix "D" to the pending petition is an invention of petitioner and not a part of the record herein. The only exhibit dealing with this subject matter is Exhibit A-1 consisting of portions of a government publication entitled "Executive Orders Relating to Indian Reservations from May 14, 1855 to July 1, 1912," showing that in the several treaties negotiated at approximately the same time in Washington Territory there was express language referring boundaries to low water when so intended. Fdg. 6. It would be unwarranted speculation to accept petitioner's suggestion at page 46 that the omission of such words in this particular Executive Order was "inadvertent error on the part of a clerk in Washington." The proof in the present case showed the extreme care and extended consideration given to surveying, defining and describing the actual reservation limits by responsible personnel upon the ground actually then operating the *de facto* reservation, who submitted the required description to Washington, D.C. for the more formal declaration finally expressed in the Executive Order. Fdg. 5; Tr. 90; Fdg. 23; Tr. 93-4; Ex. A-14-1, A-14-2, A-14-3, A-14-4.

Nothing in the present case clouds the title to any

other tidelands anywhere, particularly not that of North Pacific Coast or Alaska tribes.

There is no conflict in the decisions below with prior decisions of this court or of any other Court of Appeals.

OBJECTIONS TO REASON NO. 3

The decision below is not judicial legislation nor does it depend on rules of construction conflicting with any rules of this court.

The most liberal rules of construction will not support petitioner's claim. As noted in *Choctaw Nation v. United States*, 318 U.S. 423, 431 2, 63 S.Ct. 672, 87 L.Ed. 877 (1943), upon which petitioner relies and from which the Court of Appeals quoted (see page 20 of the pending petition):

> "... *But even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties.*"

The usually quoted *Worcester v. Georgia*, 6 Pet. 515 language is also limited as held in *Shoshone Indians v. United States*, 234 U.S. 335, 65 S.Ct. 690, 89 L.Ed. 985 (1945), also quoted by the Court of Appeals (see page 21 of the pending petition) as follows:

> "... We attempt to determine what the parties meant by the treaty. We stop short of varying its terms to meet alleged injustices. Such generosity, if any may be called for in the relations between the United States and the Indians, is for the Congress."

Here petitioner has its actual claim pending before the Indian Claims Commission, Ex. 62.

OBJECTIONS TO REASON NO. 4

Petitioner notes the Treaty specified a reservation to be "surveyed and marked out." That is literally what occurred several years later. Fdgs. 4, 5; Tr. 90; Fdg. 9, 10; Tr. 91; Ex. A-14-1, A-9, 6, 45.

The idea that this tideland strip should be included in any reservation nowhere appears in the evidence. Fdgs. 34, 24.

Petitioner's contention that ninety per cent of the sustenance of these Indians was from the property is completely contrary to the findings of the court. Fdgs. 14-22, inclusive, and 31; Tr. 92, 93.

Petitioner's further contention that the Treaty expressly recognized and contemplated and provided for the use of this particular tideland strip is sheer imagination. The Indians protected by this Treaty had their ancient fishing rights fully recognized in the Treaty but not tied to any particular geographic point (unless an accustomed ground or fishing station) and certainly not by the grant of fee title to any location. As noted in Findings 13 to 22, these Indians were river people. They had all of the Skokomish River forming a substantial margin of the reservation, a most valuable fishery, and they proceeded from that river to many places both near and far from the river and from the reservation and found according to season most prolific and useful sources of fish at areas remote from this particularly unrewarding beach.

ABORIGINAL TITLE

Plaintiff apparently would have the court find that the Indians had some form of "Indian title" or aboriginal title which they reserved and retained beyond the boundaries of the reservation.

Even though we disregard such elementary rule that all reservations in a grant are to be strictly construed against the grantor on the indulgence that no limiting rules apply to Indians, there is still no foundation for any contention that the tribes had a title in fee simple to the submerged lands in question or any contention that there was any reservation or retention of the same, either in the treaty or in the executive order.

Although it is a State court case, we would quote from a decision of the Washington State Supreme Court in reference to the nonexistence of this so-called aboriginal title, as these views of the State court have been accepted over and over again in the Federal courts. The opinion in *State v. Towessnute* (1916) 89 Wash. 478, 154 Pac. 805, at pages 481 and 482 says:

> "The premise of Indian sovereignty we reject. The treaty is not to be interpreted in that light. At no time did our ancestors in getting title to this continent ever regard the aborigines as other than mere occupants, and incompetent occupants, of the soil. Any title that could be had from them was always disdained. From France, from Spain, from Mexico, and from England we have ever proclaimed our title by purchase, by conquest, and by cession, in all of which great transactions the migratory occupant was ignored. Only that title was esteemed which came from white men, and the

rights of these have always been ascribed by the highest authority to lawful discovery of lands, occupied, to be sure, but not owned by any one before. *Johnson v. McIntosh*, 8 Wheat. 543. If in *Worcester v. Georgia*, 6 Pet. 515, the supreme court speaks of the Indians having something which the whites had yet to purchase, it was not title, but mere possessory uses for subsistence. Later cases continue to plant our title on discovery. *Martin v. Waddell*, 16 Pet. 367, 409; *United States v. Rogers*, 4 How. 567, 572.

"The Indian was a child, and a dangerous child, of nature, to be both protected and restrained. In his nomadic life he was to be left, so long as civilization did not demand his region. When it did demand that region, he was to be allotted a more confined area with permanent subsistence. True, arrangements took the form of treaty and of terms like 'cede,' 'relinquish,' 'reserve.' But never were these agreements between equals. Even when we dealt with a 'nation' the Indians were not 'within the description . . . of an independent state or sovereign nation, but of an Indian tribe . . . wards of the nation . . . communities depending on the United States . . . the recognized relation . . . that between a superior and an inferior.' *Choctaw Nation v. United States*, 119 U.S. 1, 27.

"These arrangements were but the announcement of our benevolence which, notwithstanding our frequent frailties, has been continuously displayed. Neither Rome nor sagacious Britain ever dealt more liberally with their subject races than we with these savage tribes, whom it was generally tempting and always easy to destroy and whom we have so often permitted to squander vast areas of fertile land before our eyes."

"Title to the entire region in question was ceded by the subscribing Indian tribes. To whatever extent they have been underpaid or overreached, that is the problem to be dealt with by the Indian Claims Commission in the proceeding noted as Petitioner's Exhibit 62. That action is being maintained by this petitioner on the theory that it did cede and surrender and relinquish all these properties, but did not receive adequate compensation.

Cowlitz Ind. Tribe v. Tacoma (C.A. 9, 1957) 253 F.2d 625.

The only reservation to which plaintiff can point in the treaty is in Article II of a "present use and occupancy."

United States v. Santa Fe Pac. R. Co. (1941) 314 U.S. 339, 86 L.ed. 260 at page 347 further states concerning so-called "Indian title" as follows:

> "Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political not justiciable issues. *Buttz v. Northern P. R. Co. supra* (119 US p. 30 Led. 334, 7 S.Ct. 100). As stated by Chief Justice Marshall in *Johnson v. M'Intosh, supra* (8 Wheat. (US) p. 586, 5 Led. 691), 'the exclusive right of the United States to extinguish' Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. *Beecher v. Wetherby*, 95 US 517, 525, 24 L.ed. 440, 441."

The nonexistence of a so-called aboriginal title is particularly recognized in the following two decisions:

Duwamish Indians v. United States, 79 Ct. Cls. 530 (cert. den. 295 U.S. 755 (1934));

Tee-Hit-Ton Indians v. United States (1955) 348 U.S. 272, 99 L.ed. 314 (on review of 128 Ct. Cls. 82, 120 F.S. 202).

The last cited case at page 279 (99 L.ed. 320) reviews at length the so-called concept of Indian title or aboriginal Indian interest, and in part says:

> "It is well settled that in all the States of the Union the tribes who inhabited the lands of the States held claim to such lands after the coming of the white man, under what is sometimes termed original Indian title or permission from the whites to occupy. That description means mere possession not specifically recognized as ownership by Congress. After conquest they were permitted to occupy portions of territory over which they had previously exercised 'sovereignty,' as we use that term. This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians."

Thus, whatever so-called aboriginal title might exist, it has long since been extinguished by appropriate Congressional authority. The extinguishment occurred in reference to the disposition of the allotted lands or in the disposition of the tidelands which under the enabling act passed to the State. Respondents deraign

their title both under the allotments and under the enabling act.

CONCLUSION

A land title case disposed of upon factual grounds would not seem to warrant review upon a writ of certiorari.

Respectfully submitted

WILLIAM E. EVENSON
Counsel for Respondents
Hulda S. Carlson, et al.

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